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1961

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and on Appeal therefrom in the
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and Decisions in the
Court of Criminal Appeal

Vol. 2

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COURT OF CRIMINAL APPEAL

REGINA *v.* MADAN.

C. C. A.

1961
Jan. 30.

Lord Parker C.J.,
Winn and
Nield JJ.

Conflict of Laws—Sovereign immunity—Diplomatic immunity—Waiver—Crime—Clerk employed by Indian High Commissioner—Purported waiver by defendant at committal proceedings—Fact of immunity not known to court of trial until after conviction—Waiver by High Commissioner three months after trial—Whether conviction valid—Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 18), *s.* 1 (5).

Criminal proceedings brought against a person entitled to diplomatic immunity under the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952,[1] whether the chief

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[1] Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952, s. 1: "(1) Subject to the provisions of this section— (*a*) a person for the time being recognised by Her Majesty's Government in the United Kingdom as the chief representative in the United Kingdom of any country to which this section applies, whether he is known by the title of High Commissioner for that country or by any other title, (in this section referred to as 'a chief representative'), shall be entitled to the like immunity from suit and legal process, and the like inviolability of residence, . . . as are accorded to the envoy of a foreign sovereign Power accredited to Her Majesty; (*b*) such members of the official staff of a chief representative as are

C. C. A.

1961

REG.
v.
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representative of a State or a member of his staff, in a case of mala prohibita, are proceedings without jurisdiction and null and void unless and until there is a valid waiver which must, under section 1 (5) of the Act, be made by the chief representative of the State in question or by his agent acting on his behalf.

Rex v. *A.B.* [1941] 1 K.B. 454; sub nom. *Rex* v. *Kent,* 57 T.L.R. 307, C.C.A. applied.

A clerk on the staff of the High Commissioner for India, who was entitled to diplomatic immunity under section 1 of the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952, was charged with obtaining a railway season ticket and attempting to obtain a sum of money by false pretences. He purported to waive his immunity at the committal proceedings and his position under the Act was not known to the court of trial until after the jury had convicted him, when it was said that he must have waived the immunity, and that it was too late to raise it then. Three months later the High Commissioner waived the immunity. On appeal against conviction:—

Held, that the appellant's purported waiver was ineffective, and that, as the waiver made by the High Commissioner did not purport to be retrospective, the appellant had been subjected to proceedings without jurisdiction and the convictions must be quashed.

APPEAL AGAINST CONVICTION.

The appellant, Kanya Lal Madan, aged 34, a native of India employed as a clerk in the Passport Division of the office of the High Commissioner for India, was convicted at County of London Sessions on August 9, 1960, of (1) obtaining from the London Transport Executive on March 3, 1960, with intent to defraud a duplicate three-monthly railway season ticket, falsely pretending that a ticket issued to him a few days previously was lost, and (2) with intent to defraud, attempting to obtain from the London Transport Executive the sum of 8s. 9d. He was sentenced by

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"performing duties substantially "corresponding to those performed "by members of the official staff of "an envoy of a foreign sovereign "Power shall be entitled to the like "immunity from suit and legal pro- "cess as is accorded to members of "the official staff of such an envoy; ". . . (4) The Secretary of State "shall compile a list of the persons "appearing to him to be entitled to "immunity from suit and legal "process under subsection (1) of this "section, . . . (5) Notwithstanding "anything in the preceding provi- "sions of this section—(*a*) a chief "representative may waive any im- "munity conferred by or under this "section on himself or on a member "of his staff, . . . or on a person in "the service of the Government of "the country which he represents; "(*b*) a state representative may "waive any immunity conferred "under this section on himself or on "a member of his staff. (6) The "countries to which this section "applies are . . . India. . . ."

the deputy-chairman (F. H. Cassels, Esq.) to four months' imprisonment on each count, to run concurrently.

The case for the prosecution was that on March 3, 1960, the appellant, having purchased a three-monthly railway season ticket for a journey between Baker Street and Clapham South on February 28, 1960, applied for and later obtained a duplicate from the London Transport Executive on the ground that he had lost the previous one on February 29, when he had in fact given the original ticket to a friend who had been living in the same house as he was. The appellant continued to use the duplicate ticket himself. The 8s. 9d. he was alleged to have obtained by false pretences represented reimbursement of fares he had paid until the duplicate ticket was issued. Although unknown to the court which tried him, the appellant was at all times entitled to diplomatic immunity as a member of the staff of the High Commissioner for India, his name being on the list kept by the Secretary of State under section 1 (4) of the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952. That matter came to light in the following circumstances: It appeared for the first time in the committal proceedings when one of the police witnesses in cross-examination stated that he had ascertained that the appellant was on the High Commissioner for India's staff. A solicitor then appearing for the appellant purported to waive the immunity. The appellant's position on the High Commissioner's staff again emerged when he gave evidence at the trial but nothing more was thought of the matter until after he had been convicted of the two offences with which he was charged, when the probation officer was called and questioned as to what steps the High Commissioner's Office was likely to take. After an adjournment, during which the probation officer got in touch with the High Commissioner's Office, the probation officer informed the deputy-chairman that a representative of the High Commissioner's Office was under the impression that the appellant was entitled to diplomatic immunity. The deputy-chairman then said that so far as that was concerned the defendant must at some time, if he ever thought of it, have waived it. He added: "It is a bit late to claim it now." Counsel for the prosecution told the deputy-chairman that he thought the appellant was entitled to diplomatic immunity but had expressly waived it before the magistrate either by himself or by his solicitor. On November 21, 1960, the Deputy High Commissioner for India wrote to the Commonwealth Relations Office in the following

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terms: "The High Commissioner desires me to say that Mr. "Madan is and was entitled to diplomatic immunity in accord-"ance with the Diplomatic Immunities (Commonwealth Coun-"tries and Republic of Ireland) Act, 1952. I am further directed "to say that in order not to impede the course of justice and as a "very special case, the High Commissioner is prepared to waive "the immunity in the present instance without any prejudice to "the interests of this High Commission and on the clear under-"standing that it will not be treated as a precedent in the "future."

The appellant appealed against his conviction by leave of the single judge, on the ground, inter alia, that the deputy-chairman was wrong in law in holding that he, by appearing before the court, had waived the diplomatic immunity to which he was entitled.

Christmas Humphreys Q.C. and *J. A. Kirpal* for the appellant. On the facts at all material times the appellant was entitled to diplomatic immunity by virtue of section 1 (1) (*b*) of the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952. Any attempt made by him to waive that immunity is irrelevant because, on the authorities, the only person who could make an effective waiver was the High Commissioner for India. As no waiver had been made by the High Commissioner until after the date of the trial and conviction, all the proceedings, at least from the date of committal, were for all purposes null and void.

On the question of waiver, the authorities show that the immunity of a diplomatic agent can only be waived with the sanction of the sovereign or the chief diplomatic representative of the country concerned: *In re Republic of Bolivia Exploration Syndicate Ltd.*[2] and *Dickinson* v. *Del Solar.*[3] *Taylor* v. *Best*,[4] which was referred to in *In re Republic of Bolivia Exploration Syndicate Ltd.*,[5] has been so derogated from as to be of doubtful value. All the cases referred to were decided under the Diplomatic Privileges Act, 1708, which was merely declaratory of the common law. The Act of 1952 overrules the Act of 1708 but there is no case under the later Act which derogates in any way from the principles laid down in the cases decided under the Act of 1708. [Reference was made to *High Commissioner for India* v. *Ghosh*.[6]] The appellant, as a servant of the chief diplomatic representative, has proved that he was entitled at all times during the proceedings to immunity under the Act of 1952. Therefore he was immune from criminal process until his immunity was waived by his superior. As there was no such waiver until after conviction his immunity remained and the appeal should be allowed.

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[2] [1914] 1 Ch. 139; 30 T.L.R. 78.

[3] [1930] 1 K.B. 376; 45 T.L.R. 637.

[4] (1854) 14 C.B. 487.

[5] [1914] 1 Ch. 139.

Sir Reginald Manningham-Buller Q.C., A.-G. and *J. R. Cumming-Bruce* as amici curiae. The conviction cannot be supported. It is common ground that under the Act of 1952 the appellant was at all material times entitled to diplomatic immunity because he was on the list which the Secretary of State has to maintain under section 1 (4) of the Act. Therefore he is entitled to immunity from suit and legal process. It was not in his power to waive that immunity even if he purported so to do through his solicitor at the magistrate's court. Immunity can only be waived by the chief representative of the country concerned: section 1 (5) of the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952; *Dickinson* v. *Del Solar*[7] and *Baccus S.R.L.* v. *Servicio Nacional del Trigo*,[8] in which the principle as laid down in *In re Republic of Bolivia Exploration Syndicate Ltd.*[9] was stated by Jenkins L.J.[10] Singleton L.J., who dissented on the facts, did not dissent on the principle. In the present case, therefore, an effective waiver could only be made by the High Commissioner for India and there was in fact no waiver until November 21, 1960, which was a long time after the trial and a very long time after the appellant's appearance before the examining magistrate.

The cases cited refer to civil actions, and the question arises as to the extent of diplomatic immunity in relation to criminal prosecutions. In *Rex* v. *A.B.*[11] Lord Caldecote C.J.[12] expressly left that question open. The position is accurately stated in Halsbury's Laws of England, 3rd ed., vol. 7, p. 268, para. 573, where it is said that a public minister "is exempt from the "criminal jurisdiction of the State in which he resides, and is

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[6] [1960] 1 Q.B. 134; [1959] 3 W.L.R. 811; [1959] 3 All E.R. 659. C.A.

[7] [1930] 1 K.B. 376.

[8] [1957] 1 Q.B. 438; [1956] 3 W.L.R. 948; [1956] 3 All E.R. 715, C.A.

[9] [1914] 1 Ch. 139.

[10] [1957] 1 Q.B. 438, 470.

[11] [1941] 1 K.B. 454; sub nom. *Rex* v. *Kent*, 57 T.L.R. 307, C.C.A.

[12] [1941] 1 K.B. 454, 457.

"not subject to interference or arrest except, possibly, in the "one instance of his engaging in acts contrary to its safety and "welfare." The proposition in footnote (*q*) to the effect that a distinction may be drawn between the degree of immunity enjoyed by an ambassador or High Commissioner and those who come under his cloak and are covered by his immunity is not supported by the authorities there cited. There are authorities which draw a distinction between offences mala in se and offences mala prohibita, but they are not of assistance because clearly here the offence would come within mala prohibita. So far as mala prohibita are concerned, the English courts have no jurisdiction to try a person on a criminal charge of that character if he is entitled to diplomatic immunity. Immunity does not depend on whether a claim for it is put forward or not: *In re Suarez.*[13] Ignorance of the fact that an accused is entitled to it cannot give the court jurisdiction to try him. Therefore in this case the examining magistrate had no jurisdiction to inquire into the matter: *Rex* v. *Gee.*[14] There having been no waiver, it followed that the committal was bad. All the proceedings prior to the waiver of November 21, 1960, were proceedings without jurisdiction and so were a nullity. The court could order a venire de novo: see *Crane* v. *Director of Public Prosecutions*,[15] but as amicus curiae it is not for me to advise the court to take that course. [Reference was made to *Mighell* v. *Johore* (*Sultan of*)[16] and Oppenheim's International Law, 7th ed., vol. 1, pp. 707–710.]

Ian Kennedy for the prosecutor. In view of the advice tendered, the prosecutor will not seek to support the conviction. Having regard to the appellant's position under the Act of 1952, the proceedings would be bad but the information would not itself be bad, so the question which arose was whether to apply for a new summons or for a voluntary bill, but unless the court takes a different view the matter will not be proceeded with.

Humphreys Q.C. in reply. On the question of retrospective waiver the Attorney-General's argument as to the law is adopted. As to the facts, the letter of November 21, 1960, stated in terms that the appellant "was" and "is" entitled to diplomatic immunity, so that his position prior to that date was clear. Up to the moment of the letter from the Deputy High Commissioner he was always entitled to diplomatic immunity.

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[13] [1918] 1 Ch. 176; 34 T.L.R. 127, C.A.

[14] [1936] 2 K.B. 442; 52 T.L.R. 473; [1936] 2 All E.R. 89, C.C.A.

[15] [1921] 2 A.C. 299, H.L.

[16] [1894] 1 Q.B. 149; 10 T.L.R. 115, C.A.

LORD PARKER C.J. stated the facts and continued: The appellant asserts that the waiver could only operate from November 21, 1960, in that it must be a waiver by the High Commissioner and not by himself or by his solicitor, and that, in those circumstances, both the committing magistrate and the court of trial had no jurisdiction to deal with him at all; in other words, that all the proceedings prior to November 21 last were a complete nullity, and it would follow that he has not been properly convicted.

Certain things are, we think, clear. In the first place, it is not for someone who is entitled to diplomatic immunity to claim it in the courts. It is unnecessary to refer to the authorities, but we think it is clear that proceedings brought against somebody, certainly civil proceedings brought against somebody entitled to diplomatic immunity, are, in fact, proceedings without jurisdiction and null and void, unless and until there is a valid waiver which, as it were, would bring the proceedings to life and give jurisdiction to the court. Moreover, it is clear that that waiver must be a waiver by a person with full knowledge of his rights, and a waiver by or on behalf of the chief representative of the State in question. In other words, it is not the person entitled to a privilege who may waive it, unless, of course, he does so as agent for or on behalf of the representative of the country concerned; it must be the waiver of the representative of the State. That that is clear can, we think, be seen from the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952, itself. [His Lordship read section 1 (5) and continued:]

Quite apart from section 1 (5), the law, as we understand it, has always been that the privilege can only be waived by the accredited diplomatic agent. It is sufficient, perhaps, in this connection to refer to *Rex* v. *A.B.*,[1] where Lord Caldecote C.J. said[2]: "The first thing to be said is that the privilege claimed "by the appellant is a privilege which is derived from, and in "law is the privilege of, the ambassador and ultimately of the "State which sends the ambassador. It was a privilege which "was originally based on the comity of nations, before it was "declared by 7 Anne, c. 12, in 1708. Lord Buckmaster, in the "case of *Engelke* v. *Musmann*,[3] said: 'My Lords, the privilege "'affording ambassadors and other accredited representatives of

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[1] [1941] 1 K.B. 454; sub nom. *Rex* v. *Kent*, 57 T.L.R. 307, C.C.A.

[2] [1941] 1 K.B. 454, 457.

[3] [1928] A.C. 433, 440; 44 T.L.R. 731, H.L.

" 'foreign countries immunity from all writs and processes is an " 'ancient doctrine of the common law declared in terms by the " 'Statute 7 Anne, c. 12'; and the statement that I have made " that the privilege is the privilege of the ambassador was stated " by Lord Hewart C.J. in his judgment in *Dickinson* v. *Del* " *Solar*[4]: 'The privilege is the privilege of the Sovereign by " 'whom the diplomatic agent is accredited, and it may be " 'waived with the sanction of the Sovereign or of the official " 'superior of the agent.' "

Lord Caldecote C.J. in his judgment in *Rex* v. *A.B.*[5] further referred to *Marshall* v. *Critico*,[6] where Lord Ellenborough said: "This is not a privilege of the person, but of the State which he "represents." Accordingly, in the judgment of this court, it matters not that the appellant may have expressly through his solicitor waived his diplomatic immunity. That is the general position as the court understands it in regard to civil proceedings.

So far as criminal proceedings are concerned, there is no express authority on the matter. Indeed, in *Rex* v. *A.B.*[7] Lord Caldecote C.J. expressly kept the question open in these terms: "I find it unnecessary to decide whether or not the " diplomatic privilege of the character discussed before us can " be claimed by a member of a diplomatic staff in connection with " a criminal charge."

The matter is dealt with in Halsbury's Laws of England, 3rd ed., vol. 7, p. 269, where it is stated in these terms: "He [the " representative of the State concerned] is exempt from the " criminal jurisdiction of the State in which he resides, and is " not subject to interference or arrest except, possibly, in the " one instance of his engaging in acts contrary to its safety and " welfare." In a long note (*q*) dealing with that passage the rival theories on the matter are set out, and the note ends in these terms: "There is no modern English authority on the " subject, but judicial statements suggest that the courts do not " regard the immunity to be complete in point of law, at any " rate as regards persons other than the public minister himself, " whatever may be the position in practice having regard to amity " in foreign relations."

The Attorney-General, to whom the court is indebted for his argument in this case, informs the court that he has been through the various cases and passages dealt with in that note, and that he can find no passage whatsoever which supports the proposition that any distinction is to be drawn between the privilege of the representative of the State himself and the privilege of those on his staff. When one is dealing with something, as in this case, which is mala prohibita, this court takes the view that there is no distinction to be drawn between the principles of law applicable in the case of civil proceedings and criminal charges. It would follow, therefore, that in the present case the appellant was subject to proceedings carried on without jurisdiction in that all the time he was entitled to diplomatic immunity. The sole question is whether the effect of the letter of the Deputy High Commissioner of November 21 last waiving the immunity can be said to operate in any way retrospectively. It is enough for our decision in the present case to say that on its face it does not purport to do so. What the true position would be if it had purported to be retrospective it is unnecessary for us to say. It is sufficient that in the present case it does not on any view purport to be retrospective.

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[4] [1930] 1 K.B. 376, 380; 45 T.L.R. 637.

[5] [1941] 1 K.B. 454, 458.

[6] (1808) 9 East 447.

[7] [1941] 1 K.B. 454, 457.

In these circumstances, this court has no option but to quash both convictions. It makes no further order.

Appeal allowed.

Solicitors: *Percy Short & Cuthbert; M. H. B. Gilmour, Solicitor, British Transport Commission; Treasury Solicitor.*

E. M. W.

REGINA *v.* SYKES.

C. C. A.
1961
Jan. 23.
Hilbery, Stevenson and Veale JJ.
Feb. 13.
Lord Parker C.J., Winn and Widgery JJ.

Crime — Misprision of felony — Offence — Whether it now exists — Whether active concealment necessary ingredient.

Crime—Common law misdemeanour—Sentence—Misprision of felony—Receiving—Limitation of sentence—Statute of Westminster I (3 *Edw.* 1, *c.* 9).

The appellant was convicted of misprision of felony in that, knowing that others had received stolen firearms, he unlawfully concealed the commission of the offence and he was sentenced to five years' imprisonment. He appealed against conviction, inter alia, on the grounds that the offence of misprision did not now exist, and that the concealment necessary to constitute the offence, if it existed, involved or implied some positive act on the part of the accused:—

Held, (1) that the offence of misprision existed.

Rex v. *Aberg* [1948] 2 K.B. 173; 64 T.L.R. 215; [1948] 1 All E.R. 601, C.C.A. and *Reg.* v. *Wilde* [1960] Crim.L.R. 116 considered.

(2) That the active concealment necessary to constitute the offence did not involve a positive act and a mere omission to inform the appropriate authorities of a felony, of which the appellant knew, was sufficient to justify the appellant's conviction, and, accordingly, his appeal against conviction should be dismissed.

The appellant's application for leave to appeal against his sentence of five years' imprisonment was granted. Had the appellant been convicted of being an accessory after the fact to receiving, his maximum sentence would have been two years' imprisonment; by the Statute of Westminster I the maximum sentence for misprision of felony by a sheriff was one year's imprisonment. On appeal against sentence only:—

Held, (1) that on the assumption that the offence of misprision of felony existed, it was a common law misdemeanour and as such there was no limit to the sentence of imprisonment save that in no case could an inordinate sentence be passed.

Rex v. *Morris* [1951] 1 K.B. 394; 66 T.L.R. (Pt. 2) 1050; [1950] 2 All E.R. 965, C.C.A. and *Rex* v. *Higgins* [1952] 1 K.B. 7; [1951] 2 T.L.R. 855; [1951] 2 All E.R. 758, C.C.A. considered.

(2) That it would be impossible to give a sentence of more than two years' imprisonment for misprision of felony. In the present case the appellant, having been in custody for over 10 months, had served an appropriate sentence and would be released.

APPEAL against conviction and APPLICATIONS for leave to appeal against conviction and sentence.

The appellant, Basil Landon Sykes, was convicted on indictment at the Crown Court, Manchester, before Sir Basil Nield Q.C. with misprision of felony in that knowing that others had received stolen firearms he unlawfully concealed the commission of the offence, and he was sentenced to five years' imprisonment.

The firearms were stolen from a United States Air Force station in Norfolk, brought to Manchester and arrangements for their sale made. Before the examining magistrates the appellant was charged with being an accessory after the fact to receiving, but that charge was not included in the indictment, a charge of receiving having been substituted therein, which was quashed before arraignment. Four other men were charged on the same indictment with the appellant with receiving the stolen firearms; one was also charged with misprision of felony, and two of them and the appellant were also charged with attempting to sell the firearms. Those four men pleaded guilty. The jury found the appellant guilty of misprision of felony and not guilty of attempting to sell the firearms.

The appellant appealed against his conviction on the points of law, first, that the offence of misprision of felony no longer existed and, secondly, that, if it did, some active concealment was necessary to constitute the offence. He also applied for leave to appeal against conviction on grounds of mixed law and fact and for leave to appeal against sentence.

John Hugill for the appellant. The offence of misprision of felony is obsolete: *Williams* v. *Bayley*,[1] *Reg.* v. *Semenick*[2] and *per* Devlin L.J. in Criminal Prosecution in England. *Reg.* v. *Wilde*[3] is distinguishable as being a conspiracy to defeat the course of justice. If the offence still exists it cannot be that a bare concealment will suffice. That would be unreasonable and too wide. It cannot be the common law that a parent or teacher who fails to report a child for stealing is himself guilty of an offence. Recent cases show this and attempt to confine the offence. Slade J. in *Reg.* v *Wilde*[3] introduced the "de minimis" rule. "Material gain" was introduced in *Williams* v. *Bayley*,[4] *Rex* v. *Aberg*[5] and *Reg.* v. *Hosking*.[6] If this is required, there must be material gain in return for, and not arising out of, the concealment. If gain is not required, concealment imputes some positive act, an actus reus such as a refusal to help the police. [Reference was made to *Reg.* v. *Crimmins*.[7]]

If the appellant was rightly convicted, then sentence is limited to a maximum of 12 months' imprisonment: Coke's Institutes, (1809) vol. 3, p. 140; Hale's History of the Pleas of the Crown (1778) vol. 1, p. 374; Blackstone's Commentaries, (1773) 5th ed. vol. 4, p. 121; Chitty's Criminal Law (1816) vol. 1, pp. 3, 4.

STEVENSON J. This is an appeal against conviction on two points of law and there are applications for leave to appeal against conviction and sentence. As to the appeal against conviction, it has been said on behalf of the applicant that the offence of misprision of felony does not still exist. As to that, it is quite clear that in 1948 when this court had to consider such a case in *Rex* v. *Aberg*,[8] that the court was quite satisfied that it did exist. The matter was considered only last year by Slade J. at the Leeds Assizes in *Reg.* v. *Wilde*,[9] where he had to deal with the question of whether an agreement to do an unlawful act, namely, concealment of a felony, did constitute a criminal conspiracy, and therefore had to consider the contention that is now before this court. It is enough for me to say for the moment that it is quite plain that the offence of misprision of felony does exist and that there are circumstances—or may be circumstances—in which it is essential in the public interest that a prosecution for it should be launched. I emphasise that mainly because our attention has been drawn to a work * in which a contrary view has been suggested without any authority being cited in support of it.

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[1] (1866) L.R. 1 H.L. 200, H.L.

[2] (1955) 15 W.W.R.(N.S.) 333 (Can.).

[3] [1960] Crim.L.R. 116.

[4] L.R. 1 H.L. 200.

[5] [1948] 2 K.B. 173; 64 T.L.R. 215; [1948] 1 All E.R. 601, C.C.A.

[6] [1955] Crim.L.R. 291 (Australia).

[7] [1959] V.R. 270 (Australia).

[8] [1948] 2 K.B. 173; 64 T.L.R. 215; [1948] 1 All E.R. 601.

[His Lordship then considered, in connection with the leave to appeal against conviction, the question whether or not the element of hoping for, or securing, some benefit or advantage by the accused was an essential ingredient of the offence, which was left open by the Court of Criminal Appeal in *Aberg's* case.[10] It was not possible to examine that point in the present case because it was assumed that the element of profit or advantage or benefit to the accused was indeed an ingredient of the offence, and to that extent the summing-up was favourable to the accused and he could not complain of it. It was, therefore, not open to the court to consider whether that direction was well-founded in law, but this court was not to be understood as approving or lending any weight to the view that the element of benefit to the accused was in fact a necessary ingredient of the offence. His Lordship continued:] Thirdly, it has been said that the concealment necessary to constitute this offence involves or implies some positive act on the part of the accused. We are satisfied that it does nothing of the kind and mere omission to inform the appropriate authorities of a felony of which the accused person knows is quite sufficient to justify prosecution or conviction of this offence. [His Lordship considered a further ground of mixed law and fact and continued:] In all those circumstances, we are satisfied that the appeal against conviction should be dismissed and the application for leave to appeal against conviction should be refused.

As to the application for leave to appeal against sentence, certain citations have been put before us of some antiquity, which might on one view of them suggest that there are limitations on the sentence that can be imposed in respect of this offence, namely, a limitation of one year. That is a matter which we think merits examination, and for that reason we give leave to appeal against sentence only.

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[9] [1960] Crim.L.R. 116.

* Criminal Prosecution in England, by Devlin L.J.

[10] [1948] 2 K.B. 173.

Appeal against conviction dismissed.
Leave to appeal against conviction refused.
Leave to appeal against sentence granted.

Appeal against sentence.

John Hugill for the appellant. The offence of misprision of felony was unknown before it was mentioned in Staundford's Pleas of the Crown (1557) p. 37, in which it is stated that the punishment for misprision is a fine and not imprisonment. Staundford is cited as authority for the existence of this offence by Fitzherbert in The Office and Authority of Justices of the Peace (1583) p. 44, and by Dalton in his Country Justice (1619) p. 211. There is no mention of imprisonment as the correct punishment until Coke's Institutes (1809) vol. 3, p. 140, where he says: " the concealment in sheriffs, or bailiffs of liberties is more " severely punished than in others, viz. by imprisonment for one " year." Blackstone in his Commentaries (1773) 5th ed. vol. 4, p. 121, states that punishment for misprision of felony " in a " public officer, by the Statute of Westminster I, 3 Edw. 1, c. 9, " is imprisonment for a year and a day; in a common person, " imprisonment for a less discretionary time." This statement is repeated in Chitty's Criminal Law (1816) vol. 1, pp. 3, 4.

Apart from these authorities and the commentators who wrote them, there is no reported decision on misprision of felony before 1938. In The Times of March 18, 1852, Parke B. is reported to have said in a charge to a jury in Sussex that 22 years before he had sentenced two men for misprision of felony, but he gave no other details. There is no authority at all for saying that misprision, even if it still exists as an offence, is a common law misdemeanour the punishment for which would be in the discretion of the court. [Reference was made to *Rex* v. *Casserley*,[1] *Reg*. v. *Wilde* [2] and *Rex* v. *Aberg*.[3]]

W. D. T. Hodgson for the Crown. Misprision of felony is a common law misdemeanour which may carry a sentence of imprisonment the length of which is entirely in the court's discretion, provided that it is not inordinately long. In Hawkins' Pleas of the Crown, 8th ed., vol. 1, p. 73, it is stated that there is no limit to the sentence of imprisonment for this offence. [Reference was made to *Rex* v. *Morris*,[4] *Rex* v. *Higgins*[5] and *Reg.* v. *Castro*.[6]]

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[1] The Times, May 28, 1938.

[2] [1960] Crim.L.R. 116.

[3] [1948] 2 K.B. 173; 64 T.L.R. 215; [1948] 1 All E.R. 601.

Hugill in reply. Had the appellant been convicted of being an accessory after the fact, the maximum sentence would have been two years' imprisonment. Had he been convicted, instead of acquitted, of attempted sale, the maximum sentence would have been two years' imprisonment. It is wrong to pass a longer sentence for misprision than would have been passed for the substantive offence. Had the appellant been a sheriff or public officer, under the Sheriffs Act, 1887, the maximum sentence would have been one year.

LORD PARKER C.J. This is an appeal by the appellant against a sentence of five years' imprisonment imposed upon him by the recorder at the Crown Court, Manchester, for misprision of felony. There was an appeal against his conviction[7] on grounds of law, first, that the offence of misprision of felony no longer existed and, secondly, that at any rate some active concealment was necessary to constitute the offence; he also applied for leave to appeal against his conviction on other grounds of mixed law and fact. His application and appeal in regard to conviction have been respectively refused and dismissed, but the court on that occasion gave leave to appeal against sentence, amongst other things desiring argument as to whether there was any express limitation by statute or otherwise on the length of the sentence that could be imposed.

It is unnecessary to refer to the full facts of the case. Suffice it to say that a number of people were involved in stealing firearms from a United States Air Force station in Norfolk, bringing them to Manchester and arranging for their sale, the suggestion being that they were going to the I.R.A. This appellant played some part as a contact man. He was charged before the justices with being an accessory after the fact, it being sought to prove that he had taken part in the resale of the goods. At the Crown Court, however, that was not persisted in and he was charged with misprision of felony in that knowing that others had received these firearms he failed to give any information about it.

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[4] [1951] 1 K.B. 394; 66 T.L.R. (Pt. 2) 1050; [1950] 2 All E.R. 965.

[5] [1952] 1 K.B. 7; [1951] 2 T.L.R. 855; [1951] 2 All E.R. 758.

[6] (1880) 5 Q.B.D. 490.

[7] Ante, p. 11.

Mr. Hugill, who is in the embarrassing position of having as his main argument that there is no such offence, has, nevertheless, sought to persuade us that if there is, the sentence is limited in point of time. I find it unnecessary to go through the old authorities to which he has referred us, from Staundford's Pleas of the Crown in 1557, down to Chitty's Criminal Law in 1816. It is sufficient, I think, to read a passage from Blackstone (1773), 5th ed. vol. 4, p. 121, where the law is stated thus: "Misprision "of felony is also the concealment of a felony which a man knows, "but never assented to; for, if he assented, this makes him either "principal or accessory. And the punishment of this, in a public "officer, by the Statute of Westminster I, 3 Edward 1, Chapter "9, is imprisonment for a year and a day; in a common "person, imprisonment for a less discretionary time; and, in "both, fine and ransom at the King's pleasure."

Accordingly, Mr. Hugill contends that the maximum imprisonment is one year. The court is of the opinion, however, that on the assumption that the offence of misprision of felony exists, it is a common law misdemeanour. As such there is in law no limit to the number of years' imprisonment that can be given, save only of course this, that in no case must an inordinate sentence be passed. That has been decided in this court in *Rex* v. *Morris* [8] and in *Rex* v. *Higgins*.[9]

In judging what the limit of the sentence should be, in other words, when the sentence would become an inordinate sentence, there are, of course, a number of criteria. Thus, in the case of the common law misdemeanour of conspiracy to do acts which if done would constitute a single specific offence, the limit would seem to be what could be given for the substantive offence.

So, here, it seems to this court that a limit is to be found by at any rate two considerations: first, if, as might have happened here if the evidence had been a little stronger, he had been charged with being an accessory after the fact, the limit would have been two years' imprisonment; further, by the Statute of Westminster in the case of a sheriff, where one would think the offence would be more serious, the maximum sentence laid down by the statute was one year and a day. Of course, times have changed since the passing of that statute, and there may be cases, of which it

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[8] [1951] 1 K.B. 394; 66 T.L.R. (Pt. 2) 1050; [1950] 2 All E.R. 965.

[9] [1952] 1 K.B. 7; [1951] 2 T.L.R. 855; [1951] 2 All E.R. 758.

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is said this is one, where the nature of the misprision is very serious; but at any rate it seems to the court that it would be impossible to give more than two years. It is, however, unnecessary to say in this case whether more than one year was possible, since, on the facts, it seems to the court that this man, who has been in custody since March 29, 1960, has now served an appropriate sentence. Accordingly, the court proposes to set aside the sentence of five years and to substitute such a period of imprisonment as will allow him to be discharged tomorrow.

Sentence varied accordingly.

The court later considered the appellant's application for leave to appeal to the House of Lords against his conviction.

LORD PARKER C.J. I think that the court will certify that the two points, first, whether there is an offence of misprision of felony, and secondly, whether active concealment is an essential ingredient, are of general public importance, and are points on which there had been a decision in an appeal. The court will grant the appellant leave to appeal limited to those two points.

Leave to appeal to the House of Lords.
Legal aid, solicitor and counsel.

Solicitors: *Church, Adams for Cobbett, Wheeler & Cobbett, Manchester; Director of Public Prosecutions.*

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Jan. 11, 12;
Feb. 17.

Holroyd Pearce, Harman and Davies L.JJ.

BRITISH TRANSPORT COMMISSION *v.* HINGLEY (VALUATION OFFICER) AND ANOTHER.

[LVC/1109/1958.]
[LVC/1124/1958.]

Rating—Assessment—Rateable value—Profits basis—Docks undertaking forming part of one statutory undertaking—Docks run at a loss—Nil assessment—Deficit in part of undertaking made up from other sources—Whether evidence of special circumstances justifying departure from or modification of profits basis—Rating and Valuation Act, 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 22 (1) (*b*)—*Transport Act,* 1947 (10 & 11 *Geo.* 6, *c.* 49), *s.* 3 (4).

The British Transport Commission appealed to the Lands Tribunal against assessments of £6,177 and £70 net annual value in respect of hereditaments extending over two boroughs and constituting a docks undertaking, part of the commission's single nationalised business (which by section 3 (4) of the Transport Act, 1947, "shall form one undertaking"), but assessed by established rating practice as a separate undertaking. The docks had cost millions to construct and the commission conceded that it was unthinkable that they should be closed down; but their accounts showed that they had been run at a considerable loss for some years; and it was agreed that a valuation on the "profits basis" would result in the "nil" valuation for which the commission contended. The valuation officer and the rating authority claimed that there were special circumstances in this case which justified a departure from or modification of that basis, including the circumstances that the accounts were unreal, being largely an interdepartmental matter; that the docks traffic benefited the railways which paid no rates; and that any loss in running these docks was made good from other sources within the commission; and they put forward as a reasonable rent the proposed assessments of £6,177 and £70. No contemporary evidence or particulars were given to support those figures.

The Lands Tribunal, applying the profits basis, assessed the undertaking at "nil." On appeal by the valuation officer:—

Held, dismissing the appeal, that the profits basis was established on the authorities as the correct working hypothesis to apply to the valuation of a docks undertaking; that the valuation officer had failed to discharge the onus on him of showing that there were special circumstances in the case of part of a single nationalised undertaking run at a loss which justified a departure from or modification of that basis; and that the tribunal had correctly applied the profits basis and was entitled to assess this undertaking at "nil"; nor was there any material before the court which would entitle it to substitute any other assessment.

APPEAL by case stated from the Lands Tribunal (Mr. Erskine Simes Q.C. and Mr. H. P. Hobbs). The decision of the Lands Tribunal was as follows: The British Transport Commission appealed from decisions of a Local Valuation Court for Lincolnshire confirming two assessments on the Grimsby Docks of the British Transport Commission, £6,177 net annual value and £1,562 rateable value in Grimsby County Borough and £70 net annual value, £11 rateable value in the adjoining Borough of Cleethorpes.

The hereditament had an area of some 700 acres including 77 acres of land covered with water outside and below high water mark, leaving a net area of 623 acres, of which 130 acres was separately assessed at the date of the proposal, July 16, 1956. The boundary was of irregular shape and certain sidings within the boundary were excluded as being used for railway as opposed to dock purposes, the division between dock and railway undertakings presumably having been made following and in the light of the decision in *Manchester Ship Canal Co.'s and Dock and Harbour Authorities Association's Applications.*[1]

The Royal Dock was constructed in 1852, the Alexandra Dock in 1879, Fish Dock No. 1 in 1856 and Fish Dock No. 2 in 1870, and were all railway-owned from the beginning; Fish Dock No. 3 was constructed by Grimsby Corporation in 1929 and then leased to the railway company and at the end of the lease that dock would vest in the British Transport Commission.

The trade of Grimsby Docks consisted of coal as to about 90 per cent. of the exports, and of the imports about one-third was fish and the balance general cargo.

Under the Railways (Valuation for Rating) Act, 1930, the docks were included as part of the railway undertaking and in the third valuation roll £6,000 net annual value was apportioned to Grimsby Docks. The Local Government Act, 1948, enacted, inter alia, that a railway hereditament should not be liable to be rated or be included in any valuation list and the assessment of £6,000 on Grimsby Dock became "frozen" until the coming into force of the new valuation list on April 1, 1956, save that there was an addition of £247 in net annual value in respect of a new export shed at the Royal Dock. The assessments totalling £6,247 net annual value were repeated in the new valuation list.

The evidence put before the tribunal showed that Grimsby Docks had been run at a loss for many years past and the parties were agreed that a valuation on the profits basis produced a substantial deficit.

Evidence for the appellants was given by W. A. Barnes, F.R.I.C.S., the chief estate and rating surveyor of the British Transport Commission, by H. M. Mitton, the chief administrative officer, British Transport Docks, British Transport Commission, and by J. Hancock, the commercial officer of the Eastern Region of the British Railways.

Barnes put in evidence the accounts for Grimsby Docks Division, British Transport Commission, for each year 1951 to 1955, and a valuation on the profits basis showing a very substantial deficit, after charging for running expenses, maintenance and renewal, but before allowing for a "tenant's share," and in the light of that valuation he gave it as his firm view that the assessment should be nil. In cross-examination, he conceded that the prosperity of the town of Grimsby was bound up with the port, that it was unthinkable that the dock would be allowed to close down, and that if the commission did not operate it, somebody else would be required to do so. With regard to the financial loss of running the docks, he could only speak as the estates surveyor, but he thought that the commission regarded each of its activities or divisions as undertakings which ought to be run independently and to pay their own way, but if the direct local income was not enough to pay the expenses the balance must be found by the commission from some other source.

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[1] [1927] 2 K.B. 154; 43 T.L.R. 301, C.A.

If Grimsby were to be closed down, he thought the commission possessed sufficient alternative facilities to enable it to absorb the Grimsby trade without serious dislocation. He agreed that properties on or near the docks, but so let out as to be capable of separate assessment, produced a rent of about £80,000, and while the prosperity of the businesses carried on therein was bound up with the dock, he did not think that the leases contained any specific covenant to keep the docks open. He conceded that he would not complain of the assessments totalling £6,247 if the strict profits basis were not applicable, but that that was not a view based on any matter of method or valuation, and involved the assumption that the loss at Grimsby was not brought into valuation.

Mitton said that until 1947 the docks were part of the London & North-Eastern Railway system. When the British Transport Commission came into being all their docks were managed by a Docks and Inland Waterways Executive under delegated powers, and about 1954 the executive was abolished and a separate dock management board set up as one of the divisions of the commission. He said that railways and docks were interdependent for traffic, and he gave details of the traffic at Grimsby.

Hancock thought that the volume of traffic depended on the charge made and the quality of service given, and in that connection explained the necessity for the special fish train with wagons for different destinations even though those wagons were very partially filled. He also expressed the view that the railway traffic would not be affected if Grimsby Docks were operated by somebody apart from the British Transport Commission, or even if the docks were closed down.

No evidence was given by either of the respondents.

For the appellants, Mr. Widgery submitted that on the authority of *Clayton (Valuation Officer)* v. *British Transport Commission* [2] the profits basis must be applied in the absence of special circumstances and that recent cases showed that the profits basis was still to be applied strictly. *Peterborough Corporation* v. *Stamford Union* [3] and *Barking Rating Authority* v. *Central Electricity Board* [4] were authorities for saying that the fact that the profits basis gave a nil assessment was not in itself a ground for departing from it.

It was his contention that there were no special circumstances in this case justifying a departure from the profits basis, and that nobody would be prepared to offer any rent even if, the hereditaments being vacant and to let, for social or other reasons the British Transport Commission or any other body consented to go in and run the undertaking. Further, while the appellants had put forward a valuation to justify their contention of nil, there was no evidence before the tribunal to justify the figures of the respondents.

For the respondent valuation officer the Solicitor-General argued that the suggestion of nil rent was an affront to both logic and common sense. The evidence showed that the closing down of the dock could not be envisaged and, in his submission, the occupation of a hereditament of this size and importance implied a payment of a rent, Barnes had accepted the figure of £6,247 if the profits basis were not to be strictly applied, and so the reasonable rent was established. The tribunal were bound by section 22 of the Rating and Valuation Act, 1925, but were not bound to apply the profits basis (*Metropolitan Water Board* v. *Hertford Corporation* [5]), the profits basis being no more than an aid to the ascertainment of the rent and in his submission having to be resorted to only with an undertaking where it was necessary to ensure that the values of the parts did not exceed the value of the whole.

The circumstances in the present case could be regarded as factors immediately relevant to the application of section 22 or as special circumstances rendering the application of the profits basis inapplicable. The Grimsby Docks, which only ran into two rating areas, were part of a large undertaking, the British Transport Commission, which operated as a single undertaking, but part thereof was not liable to be assessed to rates. There was a single rate of charge for the carriage of goods from the trader's premises to the dock-side, and the apportionment of the part of the charge relevant to docks was a private arrangement within the whole undertaking, and moreover, when a loss occurred on dock working, this was made up from other sources within the commission. The railways obviously obtained benefit from carrying dock traffic and the principle that contributory value should be disregarded (*Great Western and Metropolitan Railway Companies* v. *Kensington Assessment Committee* [6]) was irrelevant, where the railway benefit was not assessed.

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[2] [1955] 1 W.L.R. 504; [1955] 2 All E.R. 274, C.A.

[3] (1883) 31 W.R. 949.

[4] [1940] 2 K.B. 51; 56 T.L.R. 583; [1940] 2 All E.R. 341.

[5] [1953] 1 W.L.R. 622; [1953] 1 All E.R. 1047, C.A.

Mr. Alan Orr, for the local authorities, adopted the arguments of the Solicitor-General and emphasised the repeated statements in the decided cases that circumstances might justify either the modification of, or departure from, the profits basis and that that basis was said to be no more than an aid to the finding of a rent and was not an inflexible formula. He also referred to the number of hereditaments so let out as to be separately rated and submitted that there would be a moral or legal duty on the commission to keep the dock open because of these hereditaments, a circumstance which he thought very relevant when considering the commission as a hypothetical tenant.

The decision stated that the question whether Grimsby Docks should be assessed as a separate dock undertaking or as being part only of a larger undertaking was not before the tribunal. The respondents had given no evidence concerning the basis of the figure of £6,247 and the appellants had valued the undertaking as a separate dock undertaking.

The tribunal adopted the language of Jenkins L.J. in *Metropolitan Water Board* v. *Hertford Corporation* [7] that "it must "be borne in mind that the 'profits basis' has no statutory "authority, and sets up no new standard of rateable value, the "one and only standard (so far as is here material) being the rent "at which the hereditament might reasonably be expected to "let from year to year on the terms stated in section 22 (1) (*b*) "of the Act of 1925. The 'profits basis' is no more than an aid "to the ascertainment of that rent in cases of a particular class. "It lays down no inflexible code; the manner of applying its "general principles no doubt admits of variation to suit the "peculiarities of individual cases, and no doubt there may be "cases in which there are special circumstances sufficing to justify

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[6] [1916] 1 A.C. 23; 31 T.L.R. 608, H.L.

[7] [1953] 1 W.L.R. 622, 631–632.

"its total exclusion. Nevertheless, the 'profits basis' has behind "it the sanction of long practice and of judicial approval over "many years, and at the present time it may, I think, be said "that as a matter of law it is prima facie the right method to "apply in a case of this kind, the onus of showing special circum-"stances justifying a departure from it being upon those who "advocate such departure."

The tribunal concluded that unless it was satisfied that there were special circumstances in the case justifying a departure from the profits basis, it found no unreality in deciding that a tenant might be found who, for moral, social or statutory reasons, would accept liability for running the docks but would not be prepared to pay any rent.

It had been argued that the boundaries of the docks were arbitrary; that the accounts were largely an interdepartmental matter; that the railways benefited from dock traffic; and that any loss in running Grimsby Docks was made up from other sources within the commission; but it seemed to the tribunal that all those and other similar matters would have received full consideration following the decision of the Court of Appeal in the *Manchester Ship Canal* case [8] and it did not think that they could be held to be special circumstances such as to invalidate the use of the profits basis.

The tribunal thought that the British Transport Commission or possibly some other body viewing the docks vacant and to let would be willing to enter into a tenancy and when deciding on the rent would know that for many years the docks had been run at a loss; they would be aware that a profits valuation produced a substantial deficit before any allowance for tenants' share; they would know that part of the income arose from rents from properties so let out as to be capable of separate assessment and that the prosperity of the tenants of these properties depended largely on the docks; they would realise the size and importance of the docks; but they would also consider that the loss in operating was such that they would not be justified in offering anything as rent; and the tribunal believed that the landlord would accept such an offer, knowing that the docks would be operated and kept in good order.

The tribunal accordingly allowed the appeal and held that the assessments be shown as nil. The valuation officer appealed.

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[8] [1927] 2 K.B. 154.

Sir Jocelyn Simon Q.C., S.-G. and *Alan Orr* for the valuation officer and the corporation. Though it is conceded that the profits basis is the correct method for the equitable valuation of a public enterprise, extending over a number of rating areas, some parts of which are productive and others unproductive, a departure from or modification of that basis is required in this case of a docks undertaking which is part of a larger nationalised undertaking, where any loss on that part is made good elsewhere in the enterprise and ultimately by the Treasury and the taxpayer. It would be inequitable and contrary to logic and common sense if a vast industry like this, carried on under statutory authority, the capital cost of which ran into millions and which is essential to the life of the community and benefits greatly by the local authority services, should make no contribution to the rates: see the Grimsby Corporation (Dock, etc.), Act, 1929, which recites that the prosperity of the borough of Grimsby is largely dependent on the docks.

A proper valuation may be made, to accord with the only statutory basis laid down for valuation, namely, that in section 22 (1) (*b*) of the Rating and Valuation Act, 1925; and the bargain would be between a hypothetical landlord who has provided the capital and knows that the hypothetical tenant must occupy and operate the docks because he is under a statutory duty to do so, and a hypothetical tenant who is willing to pay a rent and operate at a loss, knowing that that loss will be made up by extraneous receipts. The bargain they would strike will be a positive amount by way of rates, and on that approach the figures proposed by the valuation officer—£6,177 and £70—represent the reasonable rent which would be agreed in those circumstances for these docks.

Any basis other than that laid down in section 22 (1) (*b*) is judge-made, as for instance the "profits basis" and the "contractors' basis," which have been adopted by the courts to deal with hereditaments which are never let. But those methods are merely means to an end, namely, the satisfaction of the test laid down in section 22: see Ryde on Rating, 10th ed., pp. 343, 350, 352–353.

Kingston Union Assessment Committee v. *Metropolitan Water Board*,[9] which is the leading authority on the whole law relating to the profits basis, is distinguishable from the present case, but is relied on because there their Lordships accepted that even in that type of case special circumstances might justify a departure

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[9] [1926] A.C. 331; 42 T.L.R. 275, H.L.

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from the profits basis: see also the dissenting judgment of Atkin L.J. in the same case in the Court of Appeal [10] against too rigid an application of the profits basis. The decision in *Barking Rating Authority* v. *Central Electricity Board*,[11] relied on before the tribunal, does not assist here; similarly, *Clayton (Valuation Officer)* v. *British Transport Commission* [12] may be authority that the profits basis should be applied to a docks undertaking in the absence of special circumstances, but it is distinguishable from the present case where there are such special circumstances. In *Metropolitan Water Board* v. *Hertford Corporation* [13] Jenkins L.J. pointed out that the profits basis has no statutory authority but is merely a means to an end. [*Peterhead Electricity Co. Ltd.* v. *Aberdeenshire Assessor*, *per* Lord Fleming,[14] was also referred to.]

A departure from or modification of the profits basis is justified in this case for the following reasons: First, there are special circumstances: (i) the docks are only part of the undertaking of the commission which " shall form one undertaking ": see Transport Act, 1947, s. 3 (4); (ii) the commission is not bound to adjust charges to cover costs in any particular part of its undertaking; (iii) a deficiency in any one part is made good by the surplus from other parts; (iv) a major part of the whole undertaking—the railways—is not rated at all but merely pays a contribution in lieu of rates: Local Government Act, 1948, ss. 85, 86; (v) the interest on the Corporation loan for building Fish Dock No. 3 and on the nationalised Transport Stock issued as compensation to former owners is paid centrally; (vi) ultimately the Government and taxpayer guarantee payment of interest on the stock. This represents largely interest on *landlord's* capital: see the relevant statutory provisions, sections 93 and 100 of the Local Government Act, 1948, on payments by the commission for the benefit of local authorities; Transport Act, 1953, s. 25, showing that it was still considered expedient to provide port facilities at Grimsby; and the Transport (Railway Finances) Act, 1957, s. 3, showing how accounts were dealt with after 1957, a special account being made for interest due on railways deficit, allowing them to borrow until 1960, when the Government proposed that the £400m. debt should be written off. The result of the statutory provisions is that the Grimsby Docks and other London and North Eastern

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[10] [1925] 2 K.B. 509, 571–572.
[11] [1940] 2 K.B. 51.
[12] [1955] 1 W.L.R. 504.
[13] [1953] 1 W.L.R. 622, 631.
[14] (1935) 6 Derating and Rating Appeals 29, 34.

Railway assets vested in the commission as " one undertaking " and any deficiency in its accounts will be borne by the commission; (vii) though the profits basis is the most practical method for valuing enterprises of this kind which extend over a number of parishes, here the hereditament lies in two rating areas only, so that there is no danger of over-assessment if the strict profits basis is departed from.

Secondly, the above matters can be considered either as " special circumstances " rendering the profits basis inapplicable, or as matters modifying its application.

Thirdly, the covering of the commission's trading deficiency in the central accounts should be considered as part of the receipts of Grimsby Dock for purposes of the application of the profits basis.

Fourthly, the payment of interest by the commission on that part of the capital which represents the assets of Grimsby Docks should be considered as the rent, payable by a hypothetical tenant.

Fifthly, the test for valuation should be the real position of the hypothetical landlord and his bargaining power in relation to the hypothetical tenant in that the tenant—the commission—is under a moral as well as a statutory duty to carry on these docks and would be bound to take a lease, while the landlord would not be willing to receive no return on his capital: see *per* Denning L.J. in *Lee* (*Valuation Officer*) v. *Mid-Northamptonshire Water Board* [15] on what the landlord could reasonably expect in relation to waterworks which he has built. The tribunal in this case has failed to take into account the real position of the landlord.

There are decisions of the Lands Tribunal in which a realistic and correct approach has been made to rating hereditaments which would normally fall within the profits basis method but in which its strict application has been departed from or modified in the way here contended for; but they did not apply those decisions in this case: see *Swindon Borough Council* v. *Tavener*,[16] *Taunton Corporation* v. *Sture* (*Valuation Officer*) [17] and *Morecambe and Heysham Borough Council* v. *Robinson* (*Valuation Officer*).[18] Where the profits formula produces a result contrary to that suggested by the known circumstances of the case, those circumstances are " special."

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[15] [1956] 2 Q.B. 55, 67; [1956] 2 W.L.R. 1012; [1956] 2 All E.R. 59, C.A.

[16] (1952) 45 R. & I.T. 410.

[17] (1958) 51 R. & I.T. 749.

[18] (1959) 52 R. & I.T. 577 (affirmed [1960] 1 W.L.R. 373; [1960] 1 All E.R. 721, C.A.).

[HARMAN L.J. If the profits basis is rejected, on what does the valuation officer rely?]

The valuer's eye. [*London County Council* v. *Erith Parish and Churchwardens, etc., and Dartford Union Assessment Committee, per* Lord Herschell,[19] was also referred to.]

If, contrary to the present submissions, the profits basis rather than the statutory basis in section 22 is to be applied in this case, the assessment must be on the basis that the docks have receipts or subsidies from outside sources, constituting unconditional aid, which should be treated as an item of gross profit analogous to the receipts in the " precepts " cases: see *Dewsbury and Heckmondwike Waterworks Board* v. *Penistone Union Assessment Committee*,[20] *Merthyr Tydfil Local Board of Health* v. *Merthyr Tydfil Assessment Committee*[21] and *Port of London Authority* v. *Orsett Union Assessment Committee*.[22]

Patrick Browne Q.C., *Harold Marnham* and *Charles Fay* for the commission. Many of the matters canvassed on behalf of the appellants were matters of fact and are not open to review by the court unless the tribunal misdirected itself or there was no evidence to support its decision: see Lands Tribunal Act, 1949, s. 3 (4), and Viscount Kilmuir L.C. in *London County Council* v. *Wilkins* (*Valuation Officer*).[23]

First, once the very experienced tribunal in this case found as a fact that no tenant would pay any rent for these hereditaments and therefore the valuation must be nil, this court cannot go behind that finding. If that is correct it is an end of this appeal.

Secondly, if the court treats that finding as a matter of law and wishes to displace the figure of nil, there is no finding of any other value than nil to put in its place, and on that ground alone the appeal must fail. There was no agreement by the commission's expert witness that if the strict profits basis were not applied the proposed value of £6,247 would be acceptable. The duty of the Revenue, under the Lands Tribunal Rules, 1956, r. 11 (iii) and (iv), was to lodge any valuation on which they relied, with supporting particulars and computations: see Ryde on Rating, 10th ed., Supplement A 93. The only document lodged by the Revenue was a copy of the entry in the valuation list.

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[19] [1893] A.C. 562, 593; 10 T.L.R. 1, H.L.

[20] (1885) 16 Q.B.D. 585.

[21] [1891] 1 Q.B. 186.

[22] [1920] A.C. 273; 36 T.L.R. 233.

[23] [1957] A.C. 362, 371; [1956] 3 W.L.R. 505; [1956] 3 All E.R. 38 H.L.

The figure there is purely arbitrary and relates to L. & N.E.R. earnings over 20 years ago apportioned on the basis laid down in the Railways (Valuation for Rating) Act, 1930, ss. 1 and 4; it is quite irrelevant to the separate Grimsby hereditaments in 1956 and is not a reliable basis on which the court could modify the profits basis valuation or even apply section 22 of the Act of 1925, for under that section the court has to find a rent, and there is no evidence before it to support any figure for rent. If that is correct, that, too, is an end of the appeal, for the commission has a finding of nil in its favour and there is nothing to put up against it.

[HOLROYD PEARCE L.J. If valuation on the strict profits basis were demonstrably wrong, the court could not substitute any other basis, and would have to send the case back to find the reasonable rent?]

Yes. If the court does not conclude the case on those findings of fact, then as a matter of law the profits basis must be applied to the valuation of these hereditaments. It is agreed that on the unmodified profits basis the valuation must be nil: compare *Barking Rating Authority* v. *Central Electricity Board*.[24] Despite the anomalies which that method produces from time to time, it is the best way of valuing such properties (see *Mid-Northamptonshire Water Board* v. *Lee*, *per* Lord Radcliffe and Lord Keith of Avonholm [25]), and has been used for docks for over 100 years: see *Reg.* v. *Southampton Dock Co.*[26]; see also *St. James' and Pall Mall Electric Light Co. Ltd.* v. *Westminster Assessment Committee*, *per* Lord Atkin [27]; Lord Evershed M.R. in *Clayton (Valuation Officer)* v. *British Transport Commission*,[28] and Jenkins L.J. in *Metropolitan Water Board* v. *Hertford Corporation*.[29] No case is known in the twentieth century in which any other basis has been applied to a docks undertaking; and where there is a long-established rating practice the courts are reluctant to disturb it and the onus of justifying a departure is on those who advocate the departure: see *per* Lord Cave in *Kingston Union Assessment Committee* v. *Metropolitan Water Board* [30] and Scrutton L.J. in *St. James' and Pall Mall Electric Light Co. Ltd.* v. *Westminster Assessment Committee* [31] in the

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[24] [1940] 2 K.B. 493; 56 T.L.R. 928; [1940] 3 All E.R. 477, C.A.

[25] [1958] A.C. 68, 88, 92; [1957] 2 W.L.R. 881; [1957] 2 All E.R. 143, H.L.

[26] (1851) 14 Q.B. 587, 591.

[27] [1934] A.C. 33, 41; 50 T.L.R. 75, H.L.

[28] [1955] 1 W.L.R. 504, 510.

[29] [1953] 1 W.L.R. 622, 631–632.

[30] [1926] A.C. 331, 340, 344.

[31] [1933] 1 K.B. 605, 642, C.A.

Court of Appeal; a fortiori where the court is being asked to abandon that established basis and there is no evidence to support any other basis. If the Revenue succeeds, the abandonment of that method should apply equally to all the commission's docks; yet in the case of the neighbouring Immingham Docks (*British Transport Commission* v. *Hingley and Robinson* (*Valuation Officers* [32]), where accounts drawn on the same principles as those applied to Grimsby Docks showed a profit, the Revenue contended for a valuation on the profits basis. They cannot have it both ways, for the docks making a loss are supported, inter alia, out of the profits from Immingham.

None of the three decisions of the Lands Tribunal on which the appellants rely is binding on this court, and all are distinguishable. The profits basis was not abandoned in any of those decisions although it was modified because there was evidence before the tribunal on which modification was possible. Further, the undertakings in those cases were not the typical profits basis undertakings; all were local authority hereditaments—for example, the esplanade in *Morecambe and Heysham Borough Council* v. *Robinson* (*Valuation Officer*).[33] If those cases purported to lay down a general principle that the profits basis can be abandoned whenever it is thought to give the wrong answer, they were wrongly decided: Ryde on Rating, 10th ed., p. 410.

Since in the absence of an alternative valuation the modification of the profits basis in this case is excluded, the only course would be a departure from that basis. The special circumstances relied on to justify such departure are on the authorities and as a matter of law not such as to justify the exclusion of the profits basis, and as a matter of fact the tribunal has found that there are no such special circumstances. In *Barking Rating Authority* v. *Central Electricity Board* [34] Goddard L.J. left open the question whether what constituted "special "circumstances" was a question of fact or of law. But what can be extracted from the authorities is that as a matter of law a special circumstance is that which makes it "necessary" to depart from the profits basis or which makes it "impossible to "apply": see *per* Lord Cave and Lord Buckmaster in the *Kingston Union* case [35]; Hilbery J. in the *Barking* case [36] at first instance; *Mid-Northamptonshire Water Board* v. *Lee* (*Valuation Officer*).[37]

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[32] (1960) 53 R. & I.T. 249.

[33] 52 R. & I.T. 577.

[34] [1940] 2 K.B. 493, 496.

[35] [1926] A.C. 331, 345, 352.

[36] [1940] 2 K.B. 51, 55.

As to the submission that it is easier to exclude the profits basis if the undertaking is all in one rating area, in *St. James' and Pall Mall Electric Light Co. Ltd.* v. *Westminster Assessment Committee*[38] the profits basis was applied to a hereditament all in one rating area; and the same situation existed in *Reg.* v. *Southampton Dock Co.*[39] *Sculcoates Union* v. *Dock Company of Kingston-upon-Hull*[40] is relied on as showing that it is irrelevant for the application of the profits basis whether the hereditament is in one or 50 areas. In any event, in this case the hereditament does extend over more than one area.

The circumstance that these docks are part of a larger statutory undertaking, part of which is not liable to be rated on ordinary principles, is not "special"; it is a requirement laid down by Parliament, and the tribunal has to do the best it can to carry out the difficult task laid on it by Parliament where some parts of the undertaking are rateable and others are not. For examples of cases where part of a larger undertaking has been separately valued on the profits basis, see *Sculcoates Union* v. *Dock Company of Kingston-upon-Hull*[40]; *Port of London Authority* v. *Orsett Union Assessment Commissioners*[41]; *Clayton* (*Valuation Officer*) v. *British Transport Commission*[42]; and the *Immingham Docks* case.[43] The commission would be content if all its docks undertakings were rated as a whole.

As to the circumstances relied on as "special" in relation to the facts that the deficit on receipts as against working expenses is carried on the general accounts of the commission, and that the interest on the Corporation loan and on British Transport Stock representing the Grimsby Docks assets is paid by the commission, the analogy with the precept cases is not maintainable, for the question whether sums received from outside are to be considered as precept receipts depends on the terms on which they are received: see *Merthyr Tydfil Local Board of Health* v. *Merthyr Tydfil Union Assessment Committee*.[44] In the present case there is no evidence one way or the other. It is not correct to say that the hypothetical tenant of this dock "cannot make a loss," for the loss may have to be paid back some day, and if there were a profit it would have to go back to the central fund. Even if it were true that the tenant cannot make a loss, the result would be no more than a break-even, which would produce a nil valuation. There is no evidence of the way in which these docks receive this so-called "precept" income, or if it is conditional or unconditional revenue. The only obligation on the commission under section 3 (4) of the Transport Act, 1947, is to balance costs with receipts. And there is no evidence about interest on the Transport Stock nor as to how much of that stock represents the assets of Grimsby Dock; nor was there any relation between those assets and the Stock Exchange valuation for compensation purposes on nationalisation in 1948, so that that special circumstance breaks down in limine. Even if a figure could be found to represent the purchase price of Grimsby Docks, the interest on which could be treated like precept income for the benefit of these docks and which should be added to the receipts of the hypothetical tenant, there is no evidence of valuation except the nil valuation. Even if the Revenue is right on this point, that does not make the profits basis "impossible" of application, and therefore it is not a special circumstance requiring a departure from that established basis.

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[37] [1958] A.C. 68.

[38] [1933] 1 K.B. 605, 606, 636, C.A.

[39] 14 Q.B. 587.

[40] [1895] A.C. 136, H.L.

[41] [1919] 2 K.B. 1, C.A.; [1920] A.C. 273; 36 T.L.R. 233, H.L.

[42] [1955] 1 W.L.R. 504.

[43] 53 R. & I.T. 249.

[44] [1891] 1 Q.B. 186.

As to the submission that the value of the docks should be increased by reason of their contribution to the value of the railways, see *Great Western and Metropolitan Railway Companies* v. *Kensington Assessment Committee*; *Same* v. *Hammersmith Assessment Committee*, *per* Lord Atkinson and Lord Parker.[45] The value of the docks should not be enhanced by taking account of the fact that they may benefit the railways. Although the commission do not pay rates in respect of the railways, they pay contributions in lieu of rates: see Local Government Act, 1948, ss. 85, 93, 95, 100.

The tribunal has found that the application of the profits basis does not produce an unrealistic result and that in real life a tenant would be willing to lease this property but not to pay rent. The Revenue has argued that because it was conceded that it is "unthinkable" that these docks should close down, someone would have to take a tenancy and would pay rent if they were vacant and to let. But that is a fallacy, for it assumes that because someone would have to be found to run the docks, he would also be prepared to pay rent, and the tribunal has found as a fact that he would not; a reasonable landlord might accept a tenant paying no rent in order to avoid the dock becoming derelict. There is no statutory duty on the commission to keep these docks open, unless it appears to them expedient to do so: see Transport Act, 1953, s. 25 (1) (*e*). So far as normal motives operate in the hypothetical world, they would operate on the hypothetical landlord as well as the hypothetical tenant. When it is said that the landlord who has spent £3m. would not accept a nil rent, it should be borne in mind that section 22 (1) (*b*) of the Act of 1925 does not say that the landlord must be willing to let the hereditament. The governing factor is what the tenant will pay for it if it is vacant and to let; it is not what the landlord would want or expect: see *per* Lord Dunedin in *Great Central Railway* v. *Banbury Union*[46] on the irrelevance of cost of construction. The tribunal rightly applied the profits basis in the present case and also considered the position of the hypothetical tenant. Its assessment of these docks at nil should not be disturbed.

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[45] [1916] 1 A.C. 23, 44, 46.

Sir Jocelyn Simon Q.C., S.-G. in reply. The making good of the deficiency in the trading account of this dock, the interest on the Corporation loan, and the interest on that part of the Transport Stock which relates to Grimsby Dock are all receipts from extraneous sources, and all those matters must be brought into account if the strict profits basis is to be applied. If it is "impossible" to discover how much of the British Transport Stock relates to this dock, that is itself a special circumstance justifying as a matter of law a departure from the profits basis.

It is not correct that, if the profits basis is excluded, there is nothing to put in its place, for there is the statutory test in section 22.

[Harman L.J. But no one on behalf of the Revenue made any valuation.]

If the decision in this case is to turn on the question whether or not the commission agreed that it would not quarrel with the figure of £6,247 if the strict profits basis were not applied, the Revenue will ask that the case be sent back to the tribunal.

The profits basis cannot be applied in this case because, by reason of the cross-subsidies operating in a nationalised undertaking, its application is excluded by special circumstances, and the tribunal misdirected itself in law by failing to take into account relevant matters, namely, the fact that losses on the

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[46] [1909] A.C. 78, 96; 25 T.L.R. 143, H.L.

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separate part of the larger undertaking are made good by cross-receipts. The tribunal has further misdirected itself in failing to take into account that the loss is fictitious and by deciding that the landlord would be willing to accept occupation of his valuable hereditament by a person who is under a statutory duty to occupy it, without requiring any rent. The profits basis is inappropriate; the evidence of alternative valuation is the figure in the valuation list, and that figure should be substituted for the nil valuation found by the tribunal.

Cur. adv. vult.

HOLROYD PEARCE L.J. The judgment I am about to deliver is the judgment of the court.

This is an appeal by the valuation officer and the Grimsby Corporation from a decision of the Lands Tribunal in respect of the assessments of two hereditaments comprising the Grimsby Docks which are part of the undertaking of the British Transport Commission.

It raises the question whether a profits basis of assessment should be applied to these hereditaments, and, if so, how it should be applied. If it is to be applied in the normal form, the result must be a nil assessment, for the docks have consistently made large losses for many years past, and the parties were agreed that a valuation on the normal profits basis produces a substantial deficit.

The local valuation court ordered the two hereditaments to be entered respectively at net annual value £6,177 (with rateable value £1,562) in the Grimsby County Borough and net annual value £70 (with rateable value £11) in the adjoining Borough of Cleethorpes. The local valuation officer had caused the hereditaments to be entered at those figures. No basis for those figures was put forward, and no evidence was given by the local valuation officer to support them.

The Lands Tribunal allowed the appeal from the decision of the local valuation court, and reduced the assessments to nil. The Solicitor-General, for the appellant, argues that such a decision cannot be right. These docks, he argues, are a large industrial enterprise. They have had some millions of capital spent on them; they extend over some hundreds of acres; they employ directly 1,000 persons, and have many others dependent on the enterprise. They must surely, he urged, make some contribution to the rates from which the enterprise draws, inter alia, the benefits of sewage and lighting, and education for the children of its employees.

It was admitted by the chief estate and rating surveyor for the British Transport Commission that the prosperity of the town is bound up with the port, that it was unthinkable that the docks would be allowed to close down, and that if the commission did not operate them somebody would be required to do so. The same witness said that he would not complain of the local valuation officer's assessments totalling £6,247 if the strict profits basis were not applicable, but that this was not a view based on any matter of method or, indeed, valuation, and involved the assumption that the loss at Grimsby was not brought into valuation.

The first of the docks was constructed in 1852, and the most recent in about 1930. The hereditaments have always been railway docks. Under the 1926 scheme they were grouped with London and North Eastern Railway, and they were nationalised in 1947.

Certain properties on or near the docks and within the hereditaments are let out by the commission at rents totalling about £80,000. Those properties are separately assessed, and have little relevance to this case save that it was argued before the Lands Tribunal that their existence created a moral or legal duty on the commission to keep the docks open because of those lettings. We cannot think that such a duty exists. It was not argued that these receipts ought to be set off against, or absorbed in, the losses of the rest of the dock undertaking.

It was conceded that the dock undertaking was properly treated as a separate undertaking, that being the method that the Revenue has applied to other docks. The dock is in fact a part of the undertaking of the British Transport Commission, which by section 3 (4) of the Transport Act, 1947, forms one undertaking. That one undertaking is to be so conducted " as " to secure that the revenue of the commission is not less than " sufficient for making provision for the meeting of charges " properly chargeable to revenue, taking one year with another." Any loss made by the commission was met, we are told, by loans first from the bank and latterly by the Exchequer. These loans at all material times were theoretically repayable by the commission (see Transport (Railway Finance) Act, 1957). It is not, therefore, strictly correct to say that any losses are made good by the taxpayer, though in the end the taxpayer will probably have to assume liability for the loans to the commission.

The commission has by section 25 (1) (*e*) of the Transport Act, 1953, a general duty to " provide . . . port facilities in such " places as may appear to them to be expedient . . . due regard " being had, as respects all the services and facilities . . . to " efficiency, economy and safety of operation and to the needs " of the public, agriculture, commerce and industry." It continues to maintain these docks, albeit at a loss, because no doubt in the light of the above-mentioned matters it appears to it expedient to do so.

The hereditaments were entered in the third quinquennial roll under the Railways (Valuation for Rating) Act, 1930, s. 3, at £6,000, and there was later an addition of £247 in respect of a new export shed at the docks. The figure of £6,000 does not, however, have any contemporary significance since it was apparently computed on a profits basis from the traffic receipts over the whole London and North Eastern Railway between 1936 and 1941 (see sections 4, 5 and 6), apportioned according to an apportionment scheme under sections 6 and 13. Moreover, it was not a valuation of the docks as a separate entity, but was an apportioned part of the value of the whole railway undertaking.

This value of £6,247 was apparently the sole foundation for the rating valuation officer's present figure of £6,247, divided between the two hereditaments into two sums of £6,177 and £70. No particulars or computations in support of such valuations were lodged under rule 11 (iii) of the Lands Tribunal Rules, 1956 [S.I. 1956, No. 1734]. In the absence of evidence to support those figures they can claim no merit save that the commission's witness, while contending that they were wrong, conceded that he would not complain of them.

The Lands Tribunal decided that there were no special circumstances justifying a departure from the profits basis. In accepting that basis it said: " We find no unreality in deciding " that a tenant might be found who either for moral, social or " statutory reasons would accept liability for running the docks, " but would not be prepared to pay any rent." And again it concluded: " It has been argued that the boundaries of the docks " are arbitrary; that the accounts are largely an inter-depart- " mental matter; that the railways benefit from dock traffic, and " that any loss in running Grimsby Docks is made up from other " sources within the commission, but it seems to us that all these " and other similar matters would have received full considera- " tion following the decision of the Court of Appeal in the

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"*Manchester Ship Canal* case [*Manchester Ship Canal Co.'s and* "*Docks and Harbour Authorities Association's Application*[1]], "and we do not think that they can be held to be special circum-"stances such as to invalidate the use of the profits basis.

"We think that the British Transport Commission or possibly "some other body viewing the docks vacant and to let would be "willing to enter into a tenancy, and when deciding upon the "rent would know that for many years the docks had been run "at a loss; they would be aware that a profits valuation produced "a substantial deficit before any allowance for tenants' share; "they would know that part of the income arose from rents from "properties so let out as to be capable of separate assessment, "and that the prosperity of the tenants of those properties "depended largely upon the docks; they would realise the size "and importance of the docks, but they would also consider that "the loss in operating was such that they would not be justified "in offering anything as rent, and we believe that the landlord "would accept such an offer knowing that the docks would be "operated and kept in good order."

That question of railway benefit from dock traffic was dealt with somewhat cursorily, no doubt for the following reason. Immediately after hearing the present case (and before giving their decision upon it) the same tribunal heard an appeal concerning the Immingham Docks which lie a few miles away from Grimsby Docks and are also part of the commission's undertaking. The Immingham Docks showed a profit on accounts drawn on a like principle as Grimsby, and the Revenue there put forward a valuation on a profits basis; and there was in that case an investigation of figures in relation to railway benefit from dock traffic. But in the present case the Solicitor-General did not investigate such figures in cross-examination, since the loss on these docks was so great that obviously no cross-examination on figures could turn the loss into a profit; this argument was directed to excluding the profits basis on principle.

The sole statutory authority for the valuation of a hereditament is contained in section 22 (1) (*b*) of the Rating and Valuation Act, 1925, which provides that the net annual value of a hereditament is an estimate of the rent at which it might reasonably be expected to let from year to year, the tenant paying rates, taxes, repairs, insurance and other expenses of maintenance. That formula dates from the Parochial Assessment Act, 1836, and from an early date, in order to ascertain the net annual value of premises where there was no letting as a guide to value, the courts were forced to adopt certain hypotheses of which the foremost were two: (a) the contractor's basis, which starts from a consideration of the cost of the construction of the hereditaments; and (b) the profits basis, which starts from a consideration of the accounts to find what are the receipts of the tenant.

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[1] [1927] 2 K.B. 154; 43 T.L.R. 301, C.A.

The contractor's basis has been consistently applied to cases where, for instance, a local authority has to provide sewage works that could not produce a revenue, or an educational institution whose object is not the collection of revenue. It is assumed that the authority which has to construct the works or the building would as a hypothetical tenant be prepared to pay as a rent a reasonable percentage on the cost of the works or building which it would otherwise have to construct (see *West Kent Main Sewerage Board* v. *Dartford Assessment Committee*, etc.[2]). It is conceded in this case that any assessment founded on the contractor's basis would produce far too high a figure owing to the very large cost of constructing these docks, and that the contractor's basis was inapplicable.

The profits basis is founded on the theory that a hypothetical tenant will take into account the receipts and be prepared, after deducting the expenses and a reasonable living for himself, to pay the balance as rent. That basis has been consistently applied to public utility undertakings (including docks) whose object is to collect a revenue. For the distinction between the two classes of case see *per* Lord Herschell in *London County Council* v. *Erith Parish and Churchwardens, etc., and Dartford Union Assessment Committee.*[3] In the present case not only the motive, but the statutory duty of the undertaking, is to collect a revenue and to cover its expenses.

As early as 1851 in *Reg.* v. *Southampton Dock Co.*[4] the profits basis was taken as the correct basis in assessing docks, all of which were apparently in the same rating area. That basis became the accepted basis for valuing such undertakings. No case has been cited in which a dock undertaking has in this century ever been assessed upon any other than a profits basis.

[2] [1911] A.C. 171, H.L.

[3] [1893] A.C. 562; 10 T.L.R. 1, H.L.

[4] (1851) 14 Q.B. 587.

In *Kingston Union Assessment Committee* v. *Metropolitan Water Board*[5] Lord Cave referred to the great difficulties encountered in applying to certain classes of hereditaments the apparently simple principle of estimating the rent at which the premises might reasonably be expected to let from year to year. As a result "it was found necessary for rating experts and the "courts to have recourse to hypotheses of a more or less violent "character." "In particular," he continued, "there was "obvious difficulty in applying the general principle laid "down . . . to a water company or other body supplying "water in a number of different parishes." In these circumstances it was desirable, in order that a fair assessment might be arrived at, to devise some formula which, while allowing a fair value to the hereditaments in each parish, would not compel the undertakers to pay rates on a sum exceeding the aggregate yearly value of their undertaking. He came to the conclusion in that case, where, in fact, the water company carried on its undertaking over a widely diffused area, that the profits basis must be applied in view of the long practice of the courts in using it for such cases.[6] He conceded the force of the reasoning which led Atkin L.J. in the court below[7] to a conclusion that the contractor's basis was to be preferred, but he said[8]: "the contrary "view has prevailed for nearly eighty years, and I venture to "think that it is now too late for the courts to adopt a different "course." Later (in a passage on which the Solicitor-General relied) he said[9]: "By this I do not mean that in no case can "another method be adopted by a rating authority in assessing "waterworks for rating purposes; but in order to justify that "course it would be necessary that the authority should be "satisfied that there are special circumstances in the case "sufficient to make it necessary for them to exclude the recog"nised formula of assessment and to resort to some other "principle, and in the case now under consideration no such "circumstances are found."

Lord Buckmaster said[10]: "It does not follow that it has ever "been laid down that such method is exclusive and must be "of universal application," and he added: "as regards a com"pany which, either by reason of its special and peculiar "statutory restrictions or by reason of any other fact, cannot be

[5] [1926] A.C. 331, 338; 42 T.L.R. 275, H.L.

[6] [1926] A.C. 331, 340.

[7] [1925] 2 K.B. 509, 564, C.A.

[8] [1926] A.C. 331, 344.

[9] Ibid. 345.

[10] Ibid. 352.

"regarded in the same light as that of an ordinary water com-"pany, it is open to consider whether other methods of valuation "may not properly be adopted."

The House was there directing its mind largely to the difficulty raised particularly in the case of water boards through the undertaking being scattered over various parishes. Moreover, it was clear that the profits basis was enjoined merely as a hypothesis intended to solve an otherwise insoluble problem, that it was one of "certain empirical rules," to use the words of Lord Parker of Waddington in *Metropolitan Water Board* v. *Chertsey Assessment Committee*,[11] and that in cases for which the hypothesis was shown to be inept it should be discarded in favour of some more workable hypothesis. In *Barking Rating Authority* v. *Central Electricity Board*[12] both in the Divisional Court and in the Court of Appeal it was said that only where the basis was "impossible" was there justification for discarding it.

Later cases adhered to this standpoint. The profits basis continued to gain additional validity by the progress of time, but always with the rider that it could be discarded or modified if special circumstances justified a departure from it. This rider has never in any reported case been put into practice in the case of a public utility undertaking. There were cited to us, however, three cases before the Lands Tribunal in which the profits basis has been applied, with some modification based on other considerations, to concerns which were not strictly public utility undertakings. Jenkins L.J. put the matter clearly in *Metropolitan Water Board* v. *Hertford Corporation*[13] in a passage which the Lands Tribunal rightly adopted as a summary of the law on this point: "it must be borne in mind that the 'profits basis' "has no statutory authority, and sets up no new standard of "rateable value, the one and only standard (so far as is here "material) being the rent at which the hereditament might "reasonably be expected to let from year to year on the terms "stated in section 22 (1) (*b*) of the Act of 1925. The 'profits "'basis' is no more than an aid to the ascertainment of that "rent in cases of a particular class. It lays down no inflexible "code; the manner of applying its general principles no doubt "admits of variation to suit the pecularities of individual cases,

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[11] [1916] 1 A.C. 337, 360; 32 T.L.R. 168, H.L.

[12] [1940] 2 K.B. 51; 493 (C.A.); 56 T.L.R. 583, 928; [1940] 2 All E.R. 341; 3 All E.R. 477.

[13] [1953] 1 W.L.R. 622, 631–632; [1953] 1 All E.R. 1047.

"and no doubt there may be cases in which there are special "circumstances sufficing to justify its total exclusion. Nevertheless, the 'profits basis' has behind it the sanction of long "practice and of judicial approval over many years, and at the "present time it may, I think, be said that as a matter of law it "is prima facie the right method to apply in a case of this kind, "the onus of showing special circumstances justifying a departure from it being upon those who advocate such departure."

That passage was followed with approval by this court in *Clayton (Valuation Officer)* v. *British Transport Commission.*[14] The latter case does not bear on the present problem since it deals with the attempted excision of certain profitable hereditaments from a dock undertaking to which admittedly the profits basis was applicable. But Lord Evershed M.R.[15] emphasised the fact that a dock undertaking was admittedly an undertaking appropriate for assessment on a profits basis, and alluded to the sanctity that this method of assessment has acquired.

Lord Atkin in *St. James' and Pall Mall Electric Light Co. Ltd.* v. *Westminster Assessment Committee*[16] gave, as examples of public utility undertakings to which the profits basis should be applied, mines, docks and harbours, sewage and drainage works, railways, water, gas and electric lighting works. That category is referred to as a class, with the omission of mines and the addition of lighthouses, in the First Schedule to the War Damage (Public Utility Undertakings) Act, 1949.

The question before us, therefore, is whether the Lands Tribunal was right in thinking that no such special circumstances had been made out as would justify the jettison of the profits basis. The mere fact that the profits basis produces a nil assessment for a large industrial concern is not a special circumstance which makes the profits basis inapplicable: *Barking Rating Authority* v. *Central Electricity Board*[17] in the Divisional Court and in the Court of Appeal. In that case one of the special circumstances alleged was (as here) that, in spite of the result of the accounts, a tenant would be prepared to pay a rent. Even if the profits basis produces anomalies, it has been found to be the best available method: see the speeches of Lord Radcliffe and of Lord Keith of Avonholm in *Mid-Northamptonshire Waterworks* v. *Lee (Valuation Officer).*[18]

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[14] [1955] 1 W.L.R. 504; [1955] 2 All E.R. 274.

[15] [1955] 1 W.L.R. 504, 510.

[16] [1934] A.C. 33, 41; 50 T.L.R. 75, H.L.

[17] [1940] 2 K.B. 51, 60; 493, 495.

[18] [1958] A.C. 68, 88, 92; [1957] 2 W.L.R. 881; [1957] 2 All E.R. 143, H.L.

The Solicitor-General contends that a departure from the profits basis is more easily justified where, as here, only two parishes are concerned, and the difficulties arising from diffusion are theoretical rather than real. But in *Reg.* v. *Southampton Dock Co.*,[19] *St. James' and Pall Mall Electric Light Co. Ltd.* v. *Westminster Assessment Committee*[20] and *Sculcoates Union* v. *Dock Company of Kingston-upon-Hull*,[21] although the undertakings were all contained in one parish, the profits basis was held to apply. Although the diffusion of an undertaking is a strong, if not a major, reason for the application of the profits basis, that basis has received so strong a sanction by use that, alike whether an undertaking be diffused over several rating areas or confined to one, very strong reasons must exist in order to justify any departure from it and the disturbance of so long a tradition of practice. On any hypothesis anomalies may be produced, but in order to avoid chaotic results it is desirable to adhere where possible to known principles. In the case of the neighbouring Immingham Docks which made a profit it suited the Revenue to regard the profits and to value on the profits basis. In the present case, where a loss is made, it suits it to disregard the loss (which must be partially paid out of the profits from Immingham) and discard the profits basis. But prima facie the Revenue, like the commission, must take the rough with the smooth and set its gains against its losses.

Mr. Patrick Browne in argument conceded that he would have no objection to all the commission's dock undertakings being valued as a whole. If, however, the docks that make a profit are to be valued on a profits basis, and those that make a loss on a different basis, it would be inequitable and lead to one of the injustices which, as the *Kingston Union* case[22] shows, the profits basis was designed to avoid.

The Solicitor-General relies as a special reason for departure from the profits basis on the fact that the commission is not bound to adjust its charges so as to cover costs in any particular part of the undertaking. But no suggestion was made in cross-examination before the Lands Tribunal that any figures were misleading in this respect or that the large deficit could by any adjustment be converted into a profit.

Again, it is argued that a major part, namely, the railway part, of the commission's undertaking is not rated at all (Local

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[19] 14 Q.B. 587.

[20] [1933] 1 K.B. 605, 636, C.A.; [1934] A.C. 33, H.L.

[21] [1895] A.C. 136, H.L.

[22] [1926] A.C. 331.

Government Act, 1948, s. 85), and therefore it cannot be said that the profitable part of it will bear rates which the unprofitable part avoids. But the railway part of the undertaking does in fact make payments in lieu of rates: see Local Government Act, 1948, s. 93. These payments are allocated according to the respective rateable valuations (section 100 (3)), and are presumably on a profits basis. If so, this argument is a reason for rather than against the application of a profits basis to the parts of the undertaking not so covered.

The Solicitor-General also puts forward as a special reason the facts that the interest on the British Transport Stock issued to former owners of the railway stock, and that the payment of £50,000 per annum interest on the loan, which we are told was raised for the construction of the latest dock, form no part of the dock accounts before us. Anomalies like these import a certain unreality into the accounts, and the Solicitor-General seized on this fact as a foundation for an argument that "it was "impossible" to work out what is really the profit or loss on the docks. It is true that all the figures wear an air of unreality. That is inevitable where the unit of assessment is in fact only a part of a far larger undertaking, all by statute to be treated as one.

The British Transport Stock was issued in exchange for the London and North Eastern Railway Stock at the market value of that stock on a certain date. We find it impossible to say that any portion of that stock represents the value attributed by the market to the Grimsby Docks. We find it impossible to draw any inference from the payment of interest on the British Transport Stock, or to hold that it is a special circumstance. The payment of interest was not referred to in the case stated, and we feel some doubt whether we would be entitled to hold that this was a determining factor. As to the Grimsby loan, no evidence was adduced, nor (as we understand it) was it ever mentioned at the hearing. Even if it be proper to consider it, it would be insufficient to overcome the very large annual deficit unless it can be established that that deficit as such is made good by some reimbursement.

The Solicitor-General argues that in the ultimate resort the taxpayer makes good the deficit, but it must be remembered that reimbursement only produces equilibrium in the accounts. It does not produce a profit. We have been referred to various cases relating to precepts. In the *Dewsbury* case [*Dewsbury and*

Heckmondwike Waterworks Board v. *Penistone Union Assessment Committee* [23]] it was held that, in assessing a water board on the profits basis, account could be taken of the amount of water rate which could be levied to meet such expenses of maintaining the waterworks as the amount of water rents and payments for the supply of water should not be sufficient to discharge. In the *Merthyr Tydfil* case [*Merthyr Tydfil Local Board of Health* v. *Merthyr Tydfil Union Assessment Committee* [24]] it was held that in such cases the true question was whether such sums were received by the water board so as to make it potentially available to them as an item of gross profit [25]: "It is so available if the money is received as the price of water "supplied, or as an unconditional aid augmenting the receipts "of the tenant; but it is not so received if the tenant received "the money on terms that he shall repay it, if he receives it in "short by way of loan. Now, do the appellants receive this "money as they would money raised by a rate in aid, as an "unconditional aid, or do they receive it by way of loan or otherwise on terms which render it not an item of gross profit?"

Applying that question to the present case we are not satisfied that any making good of the deficit can be said to be an unconditional aid to the dock undertaking. No investigation of the matter was made in evidence, and we doubt if we are justified in drawing any inferences. If we were, it seems to us that the inferences point the other way. The deficit, it seems, accumulates, being financed by loans which, so far as they come from the taxpayer or the Exchequer, are repayable even though never in fact repaid. If, then, the commission be a hypothetical tenant, there is no reimbursement, but merely a facility to borrow.

The Solicitor-General further argued that the profits basis is only a means to the end of finding what the hypothetical tenant would pay, and that the tribunal failed to consider the real position of the hypothetical landlord who would enforce some payment of rent as a return on his enormous capital outlay. He relies on the passage in the judgment of the court given by Denning L.J. in *Lee (Valuation Officer)* v. *Mid-Northamptonshire Water Board* [26]: "The hypothetical landlord who builds a waterworks "would reasonably expect to receive enough rent to enable him

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[23] (1885) 16 Q.B.D. 585.

[24] [1891] 1 Q.B. 186, D.C.

[25] Ibid. 193.

[26] [1956] 2 Q.B. 55, 68; [1956] 2 W.L.R. 1012; [1956] 2 All E.R. 59, C.A.

"to pay interest on the money he has borrowed and also to "put something aside for a sinking fund. It is true that the "question is what the hypothetical tenant can afford to pay, but "in these cases the tenant has the power to raise the additional "revenue required to enable him to pay the rent which the land-"lord would reasonably expect to receive." This might be an argument if the Revenue were contending for a "contractor's "basis," but from that common sense recoils, and it was not relied on. Against this, moreover, must be set the dictum of Lord Dunedin in *Great Central Railway* v. *Banbury Union*[27]: "Cost of construction is obviously an irrelevant consideration in "getting at the rent to be paid by a hypothetical tenant. It was "said to be so categorically by Blackburn J. in the *London and "North Western Railway* case" [*Reg.* v. *London and North Western Railway Co.*[28]].

Such considerations are but guides to a decision in each case. The tribunal, though applying the profits basis, has had in mind the aim of that hypothesis, which is to find what rent the tenant would pay. It has found specifically that the hypothetical tenant "would consider that the loss in operating was such that he "would not be justified in offering anything as rent, and we "believe that the landlord would accept such an offer knowing "that the docks would be operated and kept in good order." Although that finding is of necessity a finding on hypothetical facts, it is a finding of fact: see *per* Lord Halsbury L.C. in *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee.*[29] Providing that there was material on which the court could properly so find, we could not in our judgment interfere with it, even if we ourselves would have found otherwise.

By the Lands Tribunal Act, 1949, s. 3 (4), the appeal to this court is on law only. In *London County Council* v. *Wilkins (Valuation Officer)*,[30] an appeal from the Lands Tribunal, Viscount Kilmuir L.C. said: "It must not, however, be forgotten "that, by virtue of the Lands Tribunal Act, 1949, a decision of "the tribunal is final; but a person aggrieved by such a decision, "as being erroneous on a point of law, is entitled to require the "tribunal to state a case for the decision of the Court of Appeal. "It is, in my view, particularly important in these days, when

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[27] [1909] A.C. 78, 96; 25 T.L.R. 143, H.L.

[28] (1874) L.R. 9 Q.B. 134.

[29] [1901] A.C. 175, 180; 17 T.L.R. 444, H.L.

[30] [1957] A.C. 362, 371; [1956] 3 W.L.R. 505; [1958] 3 All E.R. 38, H.L.

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BRITISH TRANSPORT COMMISSION v. HINGLEY.

"juries in civil matters are seldom seen, that reserved fields of "fact should be inviolate and that appellate courts should not, "by the intrusion of their factual opinions, make more difficult "the correct decision on particular circumstances."

The Solicitor-General relies on three decisions in the Lands Tribunal in which the profits basis has been adopted in principle, but its results have been somewhat modified in the resultant decision. He asks us to do likewise. Those cases, however, were not dealing with undertakings which come within the class of public utility undertakings. In the case of such other undertakings such modification seems to us a matter for the Lands Tribunal and not for this court. Those cases show that the tribunal is in such cases on occasion prepared to modify the figures resulting from a profits basis where it thinks that on the facts such a course is justified. In the present case, in our judgment, we are not entitled to do so in the absence of special circumstances that justify it. We find none here. Moreover, there is no material on which this court could so modify the nil valuation. If the profits basis is to be rejected or modified, something must be put in its place. Here there is nothing. The only figure put forward in opposition to the nil valuation is the Revenue's figure of £6,247, for which there is no justification or basis at all. It would not be possible for the tribunal to find that figure to be the amount which a hypothetical tenant would have been willing to pay as there was no evidence to justify it. The tribunal did not so find, and it is therefore clear that this court cannot either. In our judgment the appeal fails and must be dismissed.

Appeal dismissed with costs.
Leave to appeal to House of Lords.

Solicitors: *Solicitor, Inland Revenue; Town Clerk, Grimsby Corporation; M. H. B. Gilmour.*

M. M. H.

1961
Feb. 15, 16.

Lord Parker C.J., Winn and Widgery JJ.

PAYNE AND OTHERS *v.* BRADLEY.

Gaming — Lottery — "Private gain" — Working men's club — Tombola sessions—Proceeds paid into general funds of club—Surplus of general funds not distributable among individual members—Whether *proceeds applied for "purposes other than purposes of private "gain"—Betting and Lotteries Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 58), *ss.* 23, 24—*Small Lotteries and Gaming Act,* 1956 (4 *&* 5 *Eliz.* 2, *c.* 45), *ss.* 1, 4.

On various dates in April and May, 1960, sessions of tombola, found by the justices to be a lottery, were held in a working men's club. Sets of tickets were sold on the club premises, each ticket entitling the holder to take part in one session of tombola. The tombola sessions were conducted as an entertainment on their own and were not incidental to any other form of entertainment. The prizes were sums of money and the sale of tickets was not confined to members of the club. After deduction of the prize money the proceeds from the sessions were paid into the general funds of the club and appeared in the profit and loss account out of which the general expenses of the club were met. Under the rules of the club no surplus of the funds was divisible among the members individually.

The appellants, the trustees and directors of the club, were charged with, in connection with a lottery, using the club premises for purposes connected with the conduct of the lottery contrary to section 22 (1) of the Betting and Lotteries Act, 1934.[1] They relied on the exemption in section 4 of the Small Lotteries and Gaming Act, 1956,[2] but the justices convicted. On appeal, in which, it being conceded that tombola was a game, and that the playing of the game was an entertainment, the sole question was whether the money paid into the general funds of the club was applied for "purposes other than purposes of private gain" within section 4 of the Act of 1956:—

Held, that, under the scheme of the Acts of 1934 and 1956, and the various exemptions contained therein, the reference to "private "gain" in connection with the promotion of lotteries was a reference to private gain to the organisers of the lottery, or to those whom they represented; and, whether the appellants were treated as the club or as representing its members, it was impossible to contend that the club and the individual members did not receive such a private gain; that, since there was nothing in section 4 of the Act of 1956 which required the meaning of the words to be restricted to direct benefit or gain to an individual or individuals, the proceeds from the tombola sessions paid into the general funds of the club were applied for purposes of private gain; and that, therefore, the exemption in section 4 (3) did not apply and the justices were right in convicting.

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[1] Betting and Lotteries Act, 1934, s. 21: "Subject to the provisions of "this Part of this Act, all lotteries "are unlawful."

[2] Small Lotteries and Gaming Act, 1956, s. 4: "(1) This section "applies to any entertainment pro-"moted in Great Britain for raising "money to be applied for purposes "other than purposes of private gain, "being an entertainment at which "games of chance or of chance and "skill combined are played in accord-"ance with the following conditions ". . . (c) the whole of the pro-"ceeds . . . are applied for purposes "other than purposes of private gain; ". . . (3) A game played at an "entertainment to which this section "applies in accordance with the said "conditions shall not be deemed to "be an unlawful lottery; and nothing "in the Betting Acts, 1853 and 1874, "shall apply to anything done by "any person in connection with the "playing of games at such an enter-"tainment in accordance with those "conditions. . . ."

CASE STATED by Huddersfield justices.

Informations were preferred against the appellants, Harry Vincent Payne, and 19 others, that they on April 27 and 30, and May 4, 7, 14 and 18, 1960, in connection with a lottery promoted in Great Britain known as "Tombola," did use premises occupied by them, namely, the main hall of the Huddersfield Friendly and Trade Societies' Club, in Huddersfield, for purposes connected with the conduct of the lottery, contrary to section 22 (1) of the Betting and Lotteries Act, 1934.

The following facts were found by the justices. On the several dates set out in the informations the 20 appellants were either trustees or, by virtue of the rules and an election, directors of the Huddersfield Friendly and Trade Societies' Club and as such, subject to the powers of general meetings, had full power to superintend and conduct the business of the club. On each of those dates sets of tickets were sold on the club premises for 2s. 6d.; on weekdays a set consisted of eight tickets and on Saturdays, three tickets. Each ticket entitled the holder to take part in one session of an amusement or entertainment known as tombola on occasions when other entertainment was provided. On each date sessions of tombola were held in the main hall of the club under the control of servants or agents of the club. On each occasion a substantial number of persons, on certain dates estimated to be about 200, took part in the amusement.

Tombola was conducted as follows:—On each ticket was printed a series of numbers which varied from ticket to ticket. The person in charge of the proceedings drew out numbers from a bag and called out the numbers so drawn. The holder of a ticket on which any such number was printed then crossed it out. The first holder of a ticket who was able in that manner to cross out all the numbers on his ticket was entitled to a prize. Occasionally a prize was given to the person holding a ticket bearing only one line of cancelled numbers.

The tombola sessions were not promoted as an incident of any entertainment of the kind referred to in section 23 (3) of the Betting and Lotteries Act, 1934. The prizes were sums of money and the sale of tickets was not confined to members of the club.

After payment of the prizes the proceeds of the playing of tombola were paid into the general funds of the club and appeared in the profit and loss account, out of which the general expenses of the club were met. For the year 1959 such profits were shown in the accounts to be in the region of £900 while the membership fees amounted to £1,059. No certificate or other satisfactory evidence of registration by the local authority under section 1 of the Small Lotteries and Gaming Act, 1956, was produced although a witness stated that, in fact, the society was so registered. Returns under that Act were not made and the club did not purport to operate these sessions of tombola under the exemption of section 1.

According to the rules of the club, annexed to the case, "2. The objects of the society are to afford the members the "means of social intercourse, mutual helpfulness, mental and "moral improvement, and rational recreation. . . . 3. All "moneys received on account of contributions and donations, "admission fees, fines, or otherwise, shall be applied according "to the rules of the society, no surplus being divisible among "the members individually. . . . 4(A). The society shall consist "of an unlimited number of members. . . . The fee of 1s. per "member, per year, shall be charged for such membership. . . . "21. A member may personally introduce friends as his guests, "but no person shall be so introduced more than three times in "one quarter, and no member may introduce more than two "friends at any one time. . . . 24. The trustees of the society "having acquired a fully paid share or shares in the Working "Men's Club and Institute Union Ltd., each member may be "entitled to all the privileges of that association. . . . 25. "Whilst the society shall hold such a share . . . and so long only "as the society shall remain a member of the Working Men's "Club and Institute Ltd., associates of the said union shall be "associate members of the society. . . ."

It was contended by the appellants that tombola was a game within the meaning of section 4 of the Small Lotteries and Gaming Act, 1956; that the entertainment was promoted for raising money to be applied for purposes other than purposes of private gain; that on all the dates mentioned in the informations the game was played at an entertainment in accordance with the conditions set out in section 4 (1) of the Act of 1956, and that the entertainment was exempted under that section, in particular, that all the proceeds of the payments made by the persons participating in the game, after making the deductions lawfully permitted, were applied for purposes other than purposes of private gain; and that "private gain" meant gain for the benefit of people as separate individuals and for their personal benefit and not as members of a properly constituted society, club, or similar body of persons or in a collective capacity.

It was contended by the prosecutor that tombola was a lottery inasmuch as the prizes were awarded by pure chance and there was no element of skill, for the drawing of a series of numbers from a bag was the same as awarding prizes by lot; that section 21 of the Betting and Lotteries Act, 1934, provided that all lotteries were unlawful, subject to the exemptions set out in sections 23 and 24 of that Act and sections 1 and 4 of the Small Lotteries and Gaming Act, 1956; that the exemption of certain small lotteries prescribed by section 23 of the Act of 1934 did not apply in this case as the entertainment provided was not of the character set out in subsection (3) of that section, the net proceeds were not being devoted to purposes other than private gain and money prizes in the lottery were given; that the exemption of certain private lotteries prescribed by section 24 did not apply because the sale of tickets or chances was not confined to the classes of persons referred to therein; that the exemption of certain small lotteries prescribed by section 1 of the Act of 1956 did not apply inasmuch as the whole of the proceeds of the lottery after making the permitted deductions therefrom was not devoted to purposes other than private gain, that returns to the local authority under section 3 of that Act had not been made and that the appellants did not purport to conduct the lottery in pursuance of the said exemption; that the exemption of small gaming parties prescribed by section 4 (3) of the Act of 1956 did not apply since (i) tombola was a lottery and was not a game as the persons participating in the amusement did not take any active part in it but merely kept a record of numbers drawn by the person in charge of the activity; (ii) if it was a game, condition (*c*) in subsection (1) as to the application of the proceeds for purposes other than purposes of private gain was not complied with in that the net proceeds were paid into the general funds of the club towards the payment of the expenses and the maintenance of the club premises, providing improvements to the amenities of the club and reducing membership fees and subscriptions; that if a purpose was not for "public gain" it must be for "private gain" and in this case benefit accrued to individuals who were members of the club and not to members of the general public; and that none of the statutory exemptions applied and, accordingly, the lottery was unlawful and the appellants were guilty of offences under section 22 of the Act of 1934.

The justices were of the opinion that tombola as played on the occasions set out in the informations was a game of pure chance without any element of skill; the drawing of numbers from a bag was equivalent to awarding prizes by lot and therefore tombola was a lottery; that sections 23 and 24 of the Act of 1934, and section 1 of the Act of 1956, did not prescribe exemption from the provisions of section 22 of the Betting and Lotteries Act, 1934, as conceded by the appellants; that the fact that tombola was a lottery did not prevent it from being a game or the holding of a tombola session from being a gaming party; and that the interpretation of the words "private gain" must determine whether that game was exempt by either section 1 or section 4 of the Small Lotteries and Gaming Act, 1956. Although they did not accept the contention that a purpose which was not for "public gain" was necessarily for "private gain," they were of opinion that in this case the proceeds of the payments made by the persons taking part in the game were not applied for purposes other than purposes of private gain for the following reasons:—(i) The profits from the playing of tombola were paid into the general funds of the club. (ii) The total for the last year, a sum in the region of £900, appeared in the profit and loss account for the year when the membership fees amounted to £1,059 and debited to that account were all the expenses of the club; thus the proceeds were used to meet the general expenses of the club. (iii) Although rule 3 of the club rules provided that no surplus of moneys received should be divisible among the members individually, the profits from the playing of tombola were used to finance all the amenities and social activities of the club in which the members shared and which they and any guests whom they might wish to introduce enjoyed. That was a gain and a private one because those advantages and privileges were only available to members of the club which was the property of the members. (iv) The profits were used to avoid a loss which would fall on the individual members of the club and the avoidance of such a loss was a private gain.

The justices held that the exemption prescribed by section 4 of the Act of 1956 did not apply, and accordingly they convicted the appellants of the several offences, made orders of absolute discharge in respect of each charge and ordered each appellant to pay the sum of 4s. for costs in respect of each conviction.

The appellants appealed.

P. M. O'Connor Q.C. and *Arthur Hutchinson* for the appellants. The sessions of tombola were promoted for raising money, and the whole of the proceeds were applied for "purposes other "than purposes of private gain" within the meaning of section 4 (1) of the Small Lotteries and Gaming Act, 1956. "Private "gain" there means personal monetary gain to the promoters of the lottery, and so long as any of the proceeds do not go into the pockets of the individual promoters the requirement of subsection (1) (*c*) is satisfied. The expression "private gain" in this legislation originated in section 23 (2) of the Betting and Lotteries Act, 1934, which provided that certain lotteries should be deemed not to be unlawful, and that it means monetary gain to the promoters is shown by the general scheme of the legislation and the contexts in which the expression is used: see, for example, section 24 (1) of the Act of 1934 giving exemption to lotteries promoted by a wide range of organisations provided that, inter alia, the proceeds are devoted to the purposes of the organisation, and section 1 (1) (*c*) of the Act of 1956, from which it appears that Parliament intended "purposes other than purposes of "private gain" to include the purposes of charitable, athletic sports or games or cultural societies. See also section 20 of the Betting and Gaming Act, 1960, where the same expression is used.

There is a distinction between the purposes of an organisation and the purposes for which the proceeds of the lottery promoted by that organisation are to be applied, so what has to be looked at is the application of the money, that is, the purposes for which it is ultimately applied: where the money is applied for the purposes of an organisation established and conducted for the purposes set out in section 1 (1) of the Act of 1956, and which is capable of registration under that subsection, it is applied for "purposes other than purposes of private gain." That was the view taken in *Bishopbriggs and District Ratepayers' Association* v. *Lanark County Council.*[3] In *Bow* v. *Heatly*[4] the court did not deal with this point, but it is a reasonable inference that the proceeds were applied to the funds of the association. [Reference was also made to *Blair* v. *Duncan*[5] and *Houston* v. *Burns*.[6]]

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[3] (1959) 75 S.L.R. (Sheriff Court Reports) 3.

[4] 1960 S.L.T. 311, Ct. of Sess.

"Gain" in this legislation should not be equated with "profit." There is no reason for so construing it and, had Parliament intended "private gain" to have the same meaning as "private profit," it would have used the word "profit" and not "gain." [*Performing Right Society Ltd.* v. *Bray Urban District Council*[7] was also referred to.] As to whether tombola is a "game," see *Tollett* v. *Thomas*.[8]

M. Griffith Jones for the prosecutor. There was here actual gain to the individual members of the club; by rule 4 (B) the directors may at any time increase the membership fees and, therefore, it was a considerable gain to the individual members that the proceeds from the tombola sessions were paid into the general funds of the club.

If the object of the words "purposes other than purposes of "private gain" in this legislation is merely to prevent individual persons from obtaining a gain or profit, they are inadequate, for, if the argument for the appellants be right, there would be nothing to prevent two or three individuals from forming themselves into a club, paying the proceeds from a lottery into the funds of the club, and then paying the funds out to themselves. The words should be construed as meaning that the proceeds must be applied to some object of general or common gain as opposed to the private gain of the individual or the limited number of persons who promote the lottery. The scheme of the legislation is that all lotteries are unlawful unless they come within one of the four exceptions in sections 23 and 24 of the Act of 1934 and sections 1 and 4 of the Act of 1956. Section 23 (3) of the Act of 1934, as is clear from the type of entertainment to which it applies, provides exemption for certain lotteries promoted for charitable or general purposes, and the object of the requirement in section 23 (2) (a) that the proceeds be devoted to "purposes other than purposes of private "gain" is to prevent the proceeds going to the advantage of the promoters who might be individuals or a society. It is significant that section 24 of the Act of 1934, the section which allows societies to hold lotteries for their own purposes, makes no mention of "purposes other than the purposes of private gain."

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[5] [1902] A.C. 37; 18 T.L.R. 194, H.L.

[6] [1918] A.C. 337; 34 T.L.R. 219, H.L.

[7] [1930] A.C. 377, 390; 46 T.L.R. 359, P.C.

[8] (1871) L.R. 6 Q.B. 514.

The essence of that exemption is that the lottery shall be "private" and the sale of tickets confined to members of the society. The preamble to the Act of 1956, ". . . to authorise "the conduct of small lotteries for purposes other than private "gain by societies for raising money for charitable, sporting and "other purposes . . . ," is also significant. Paragraph (*c*) of section 1 of that Act must be construed ejusdem generis with paragraphs (*a*) and (*b*), so that the purposes for which the proceeds are to be applied are, again, for the general or common good rather than for the gain of the society itself. Had it been intended otherwise, there would be no reason for the limitations in regard to expenses and prizes in subsection (2) (*e*) and (*l*). So, also, section 4 of the Act of 1956, which is primarily concerned with gaming parties, uses the words "purposes other than "the purposes of private gain" in the same context, that is, it provides an exemption when the proceeds are applied for, broadly speaking, charitable purposes. Compare *Performing Right Society Ltd.* v. *Bray Urban District Council*,[9] where proceeds applied for the relief of ratepayers, who were not the persons organising the entertainment, were held to be applied for "private "profit."

In view of the decision in *Tollett* v. *Thomas* [10] it is not contended that the tombola was not a game; it is conceded that it was an entertainment.

O'Connor Q.C. in reply. Should two or three individuals club together to promote a lottery and pay the proceeds into the club funds and then to themselves, the proceeds would clearly be applied for purposes of private gain. But that is not this case, for under the rules of the club no surplus of the funds is divisible among the members. The exemption provided by section 24 of the Act of 1934 for societies holding lotteries for their own purposes provided that the sale of tickets is confined to limited categories of persons, was enlarged by section 1 of the Act of 1956 in the case of societies established for certain purposes: that is an indication that, in the context of private gain, it is the purposes for which the society was established which must be looked at.

If the organisation promoting a lottery is itself a charity, and the proceeds are paid into its funds, there would be a gain to a charity and no one would seek to argue that it was a "private "gain." So, too, with other organisations. That this club might use the proceeds to pay its staff, for example, is no answer: were a charity to do the same, there would be no actual allocation of the proceeds to general or charitable purposes, but they would not be applied for private gain. It would be an absurd situation if, on the true construction of section 4 of the Act of 1956, the organisation promoting the lottery may not take any part of the proceeds into its own funds but must apply them to the purposes of some other organisation.

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[9] [1930] A.C. 377, 390.

[10] L.R. 6 Q.B. 514.

LORD PARKER C.J. The appellants appeal by way of case stated from the decision of the stipendiary magistrate and two justices for the County Borough of Huddersfield convicting them of offences against section 22 (1) of the Betting and Lotteries Act, 1934. The justices made orders of absolute discharge and ordered each appellant to pay 4s. costs in respect of each conviction.

The circumstances are as follows: the appellants are either trustees or directors of a club called the Huddersfield Friendly and Trade Societies' Club. Under the rules of the club it is provided that its objects are " to afford the members the means " of social intercourse, mutual helpfulness, mental and moral " improvement, and rational recreation "; and by rule 3 " All " moneys received on account of contributions and donations, " admission fees, fines, or otherwise, shall be applied according " to the rules of the society, no surplus being divisible among the " members individually." By rule 4 the membership " (A) shall " consist of an unlimited number of members. . . . The fee of 1s. " per member, per year, shall be charged for such membership," and " (B) if at any time it appears to the directors, that the society " is in such a position as to render it necessary to alter the fees " for membership, they shall call a special meeting of the " members, who shall have power by increasing or reducing the " same, to alter such fees subject to the registration of the appro- " priate amendment of rules."

On a number of days the subject of the informations the appellants held sessions in the main hall of the club whereat tombola was played. On each of the days, sets of tickets were sold on the club premises for 2s. 6d., each ticket entitling the holder to take part in one session of tombola. These sessions were conducted as an entertainment on their own and were not incidental to any other form of entertainment. I find it unnecessary to describe the game; it is now only too well known. The prizes were sums of money and the sale of tickets was not confined to members of the club. Finally, after the payment of the prizes, the proceeds were all paid into the general funds of the club. Indeed, for the year 1959 the profits from these sessions were shown in the accounts to be in the region of £900, while the membership fees amounted to £1,059.

In order to decide this case it is necessary to look at the scheme of the Acts in question. The Betting and Lotteries Act, 1934, by section 21 provides that: "Subject to the provisions of "this Part of this Act, all lotteries are unlawful." It then provides by section 22 for "offences in connection with lotteries," and the relevant offence with which the appellants were charged was under subsection (1): "Subject to the provisions of this "section, every person who in connection with any lottery promoted or proposed to be promoted either in Great Britain or "elsewhere . . . (*f*) uses any premises, or causes or knowingly "permits any premises to be used, for purposes connected with "the promotion or conduct of the lottery . . . shall be guilty of "an offence." That, be it observed, applies to all lotteries whether lawful under the subsequent provisions of the Act or unlawful under the general provisions of section 21.

But subsection (2) of section 22 goes on to provide that it shall be a defence to such a charge if it is proved that, to put it shortly, the lottery is exempted from illegality by the subsequent provisions of the Act. In fact there are four relevant exceptions, the first two to be found in this Act of 1934 and the other two to be found in the subsequent Act of 1956. Thus by section 23 of the Act of 1934 an exemption is provided in the case of lotteries promoted as an incident of an entertainment of a particular sort; and subsection (3) provides that the entertainments in question are "bazaars, sales of work, fêtes and other entertainments of a "similar character." If a lottery is promoted as an incident to such an entertainment, then subject to certain conditions set out in subsection (2) it is lawful, and one of the conditions in paragraph (*a*), is that the whole proceeds of the entertainment, including the proceeds of the lottery, after deducting expenses and matters of that sort, shall be devoted "to purposes other "than private gain." It is not suggested that the appellants can claim the benefit of that exemption, because the tombola, assuming it to be a lottery, was not promoted as an incident of any such entertainment, as indeed the justices specifically found.

The next exemption is provided by section 24, which deals with what are called private lotteries. The essence of that provision is that societies, which include clubs, institutions, organisations or other associations of persons may conduct private lotteries in which the sale of tickets or chances by the promoters is confined, broadly speaking, to members of the society, and provided that that is done, and certain other conditions are fulfilled, the private lottery is not to be deemed an unlawful lottery. In that case, be it observed, one of the conditions is that the whole of the proceeds after payment of expenses shall be devoted either to the provision of prizes or to purposes which are "purposes of the "society." In other words, provided the lottery is kept private, a club or society within the meaning of the section may devote the proceeds, after payment of expenses, to their own purposes. Accordingly, the appellants in my judgment, could have obtained the benefit of this exemption had they confined the sale of tickets to members.

Turning to the Small Lotteries and Gaming Act, 1956, section 1 provides that a lottery shall be deemed not to be an unlawful lottery if it is promoted by a society of much the same kind as those described in section 24 of the Act of 1934, which has been registered by a local authority, being a society established and conducted wholly or mainly for one or more of the following purposes, that is to say, (*a*) charitable purposes, (*b*) participation in or support of athletic sports or games or cultural activities, and finally "(*c*) purposes not described in the foregoing para- "graphs, and not being purposes of private gain or purposes of "any commercial undertaking," and, subject to certain conditions, the money raised is to be applied for "purposes of the "society." Finally, by subsection (2) (*d*) of section 1 it is made a condition that the whole proceeds, after deducting sums lawfully appropriated on account of expenses or for the provision of prizes, shall be applied to purposes of the society, "being pur- "poses described in paragraph (*a*), (*b*) or (*c*) of subsection (1) ". . ." of section 1.

Accordingly, as I read it, a society, if it is of a particular kind, namely, established or conducted wholly or mainly for certain purposes, and which becomes registered by the local authority, can raise money which presumably will be paid over to the society in question, provided it is when so paid applied for one or other of the particular purposes. Pausing there, the appellants in this case cannot bring themselves within that exemption, in particular, because they were not registered by the local authority.

The final exemption, and the one which is relied on in this case, is to be found in section 4 of the Act of 1956. So far as it is relevant, it provides, by subsection (1), as follows: "This "section applies to any entertainment promoted in Great Britain "for raising money to be applied for purposes other than purposes "of private gain, being an entertainment at which games of "chance or of chance and skill combined are played in accordance "with the following conditions, that is to say . . . (*c*) the whole "of the proceeds of such payments . . . after deducting sums "lawfully appropriated on account of expenses or for the provision of prizes or awards in respect of the games, are applied "for purposes other than purposes of private gain." Be it observed that that section is dealing with games, but by subsection (3) if and in so far as a game played at an entertainment under this section is a lottery, it is not to be deemed an unlawful lottery.

It is conceded for the purposes of this case that tombola is a game; it is further conceded for the purposes of this case that the playing of the game was an entertainment. It is also clear that the game in question, as the justices found, is a lottery. But if the proceeds were applied for purposes other than purposes of private gain then that lottery would be a lawful lottery and there would be a defence under section 4 of the Act of 1956 to the charge. The sole question, therefore, in this case is whether the money which was paid into the general funds of the club was or was not being applied for purposes other than purposes of private gain. I am quite satisfied that, looking at the various exemptions to which I have referred, the repeated reference there to private gain in connection with the promotion of lotteries is clearly a reference to private gain to the organisers of the lottery or those whom they represent. Looked at in that way, whether the appellants are treated as the society or as representing the members of the society, it seems to me impossible to contend that the society itself and the individual members did not by these means get a private gain. The real question is whether, that being the ordinary, as I would venture to think, interpretation, there is anything in this section which would require that "private gain" should be given some other and more constricted meaning.

Mr. O'Connor, as I understand, said that "private gain" in this connection only occurs when the money goes directly to the benefit or to the gain of an individual or individuals. In other words, he said that you must look beyond the society and see whether the money, having got into the coffers of the society, finds its way to individual members directly. He would add that since, under the rules, no surplus can be divided amongst the members, no member can directly get any pecuniary benefit from the sums so paid into the general funds of the society.

I am quite unable to give the words that meaning; I think that, in every sense of the words, this money was being paid to the "private gain" of the society, and of the individual members of the society. In these circumstances, I have come to the conclusion that the justices were right in convicting, and I would dismiss this appeal.

WINN J. I agree.

WIDGERY J. I also agree.

Appeal dismissed with costs.

Feb. 24. On an application under section 1 of the Administration of Justice Act, 1960, the court certified that a point of law of general public importance was involved in the decision and gave the appellants leave to appeal to the House of Lords.

Solicitors: *Biddle, Thorne, Welsford & Barnes for G. E. Hutchinson & Co., Huddersfield; Sharpe, Pritchard & Co. for H. Bann, Huddersfield.*

J. F. L.

ALDER v. MOORE.

C. A.
1960
Oct. 12, 13;
Nov. 18.
Sellers and Devlin L.JJ. and Slade J.

Contract—Penalty clause—Insurance—Payment of sum to footballer for injury—Undertaking that if he plays football again he will be subject to penalty of that sum—Whether insurers can recover sum on breach of undertaking.

By a policy of insurance taken out on behalf of their members by the Association Football Players' and Trainers' Union with Lloyd's, it was provided that if a member of the union, who was registered as a player, sustained permanent total disablement he would be paid £500. The defendant, a professional footballer and a member of the union, received an injury in the course of a match which caused damage to his right eye. Having been certified as totally disabled, the underwriters paid the defendant the agreed sum, having first obtained from him a declaration pursuant to the terms of the policy as follows: "In consideration of the above "payment I hereby declare and agree that I will take no part as

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"a playing member of any form of professional football in the "future and that in the event of infringement of this condition I "will be subject to a penalty of the amount stated above."

Within four months of receiving the money, and without any improvement to his eye, the defendant began to play professional football again. The underwriters claimed the return of the £500. The defendant contended that the payment claimed was a penalty:—

Held (Devlin L.J. dissenting) that, notwithstanding the word "penalty" used in the declaration, the obligation imposed on the defendant was to reimburse the underwriters that which they had paid on a basis proved to be false by events; the payment was neither an imposition of a fine nor a penal payment and, accordingly, was recoverable from the defendant.

In re Apex Supply Co. Ltd. [1942] Ch. 108; [1941] 3 All E.R. 473 applied.

Cooden Engineering Co. Ltd. v. *Stanford* [1953] 1 Q.B. 86; [1952] 2 T.L.R. 822; [1952] 2 All E.R. 915, C.A. distinguished.

Decision of Paull J. reversed.

APPEAL from Paull J.

The plaintiff, Kenneth Frederick Alder, suing on behalf of himself and others named as underwriters to a Lloyd's policy of insurance made between the underwriters and the Association Football Players' and Trainers' Union, claimed from the defendant, Brian Magowan Moore, a professional footballer and a member of the union, the sum of £500, which the underwriters had paid to the defendant in respect of "permanent total dis-"ablement" as a result of an injury to his right eye, received on December 26, 1955, while playing football. Clause 8 of the policy provided: "No claim shall be paid hereunder for permanent total "disablement unless the claimant shall have given the under-"writers a signed declaration to the effect that he will take no "part as a playing member of any form of professional football "in the future and that in the event of infringement of this "condition he will be subject to a penalty of the amount paid "him in settlement of his claim." The defendant signed the undertaking and on August 31, 1956, duly received £500 in settlement. In December, 1956, notwithstanding his injury and though not then a member of the union, the defendant resumed employment as a professional footballer. The plaintiff claimed the return of the £500. Paull J., although of the opinion that the sum claimed was not a penalty, held that the contra proferentem rule should be applied in construing the agreement in which "member" could refer to membership of the union, and gave judgment for the defendant. The plaintiff appealed and the defendant by counter-notice claimed that the plaintiff's claim was for the enforcement of a penalty.

Anthony Cripps Q.C. and *Edward Grayson* for the plaintiff. When condition 8 is read, the words "as a playing member" in their ordinary sense mean "as a player" in professional football. They do not refer to membership of the union. Paull J. was wrong in applying the contra proferentem rule. As to the use of the word "penalty," *Public Works Commissioner* v. *Hills*[1] can be disregarded. This is a case, like *Law* v. *Redditch Local Board*,[2] where a specific sum was payable on a single event.

[SELLERS L.J. This is not an assessment of damages is it? It is more like a refund in the light of events.]

It is an assessment of damages. It is not a penalty but a reasonable provision on the part of the insurers. The risk is fitness for professional football, and the event upon which the sum of £500 was repayable was the defendant again playing professional football. The underwriters were liable only in the event of permanent total disablement and, since events have shown that the defendant was never totally disabled, his undertaking to repay the sum of £500 if he played professional football again must be enforceable. The money would not have been paid unless the undertaking had been given, and therefore the amount of the payment must be taken as the measure of damage suffered.

David Hunter for the defendant. The word "member" is defined in the policy as "a person of the male sex who is "registered as a member of the union." The union includes players and trainers. On every occasion where the word is used in the policy, with or without capital, "member" means member of the union. The phrase "playing member" therefore means a playing member of the union, and is deliberately used (it being a group policy) to prevent underwriters being put on risk twice in respect of permanent total disablement of the same man. Alternatively the word is at least ambiguous, and any ambiguity in clause 8 must be resolved in the defendant's favour: *Houghton* v. *Trafalgar Insurance Co.*[3] If the plaintiff's construction of clause 8 is correct, there are a variety of circumstances under which the £500 would be repayable without the insurers having sustained

[1] [1906] A.C. 368, P.C.

[2] [1892] 1 Q.B. 127; 8 T.L.R. 90, C.A.

[3] [1954] 1 Q.B. 247; [1953] 3 W.L.R. 985; [1953] 2 All E.R. 1409, C.A.

any damage at all. There can be no genuine pre-estimate of damage here. This is a penalty and nothing more: see *Cooden Engineering Co. Ltd.* v. *Stanford*,[4] where the Court of Appeal dissented from the reasoning of Simonds J. in *In re Apex Supply Co. Ltd.*[5] The law as to a penalty applies to the defendant's undertaking because it is described as a penalty and also because the sum was repayable on a number of contingent events. [Reference was made to *Lamdon Trust Ltd.* v. *Hurrell*.[6]] The underwriters could not really be concerned as to whether the defendant played football again or not.

Edward Grayson, in reply, referred to Somervell L.J.'s judgment in *Cooden Engineering Co. Ltd.* v. *Stanford*.[7]

Cur. adv. vult.

Nov. 18. The following judgments were read.

SELLERS L.J. This is an appeal from a decision of Paull J. The judge appears to have taken a preliminary view of the case which I think was right and with respect is to be preferred to that on which he gave judgment for the defendant.

The plaintiff sues as a representative underwriter and the claim arises under or as a consequence of a Lloyd's policy of insurance entered into between the subscribing underwriters and the Association Football Players' and Trainers' Union. The policy expressly provided that it and all benefits payable under it should be held by the union in trust for the respective members and the union should have no beneficial interest thereunder. It was current from August 1, 1955, to July 31, 1956. At the commencement of this period the defendant was a member of the union and was a professional footballer with the West Ham United Football Club, which was a club in the first division of the Football League. On December 26, 1955, in the course of a match, the defendant received an injury which caused damage to his right eye with the result that its visibility is permanently reduced to no more than 10 per cent. of full vision, and it was thought by those advising the underwriters, and it would seem by the defendant himself, that such a disability would preclude him from further participation in professional football.

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[4] [1953] 1 Q.B. 86; [1952] 2 T.L.R. 822; [1952] 2 All E.R. 915, C.A.

[5] [1942] Ch. 108; [1941] 3 All E.R. 473.

[6] [1955] 1 W.L.R. 391; [1955] 1 All E.R. 839.

[7] [1953] 1 Q.B. 86, 91.

The policy of insurance provided that if at any time during the period of the policy a member of the union should sustain any bodily injury caused by accidental violent external and visible means the subscribing underwriters would pay to the union or its nominee certain sums in the circumstances stated. The first and relevant benefit is as follows: "In respect of a member "registered as a player with the Football League and who has "not reached the age of 31 at inception of this policy: £500 in "the event of injury which shall solely and independently of any "other cause occasion his death or permanent total disablement "(as hereinafter defined) or such lesser sum as may be mutually "agreed (see General Condition 9) but payment to be in any case "within seven days after the total claim being substantiated "under this policy."

The defendant was 21 at the time of his accident and was registered as a player with the Football Association, which I understand controls the Football League, and there is no dispute that it was the registration intended and he became entitled to the benefit of £500 in accordance with the insurance cover given by provision 1 and applying definition 4, which is: "'Permanent "'Total Disablement' shall be deemed to have arisen in relation "to a member if the member shall have been disabled from "playing association football for six consecutive months and has "become so permanently incapacitated as to make it impossible "for him ever to resume employment as a professional player "of association football, as the result of sustaining accidental "personal injury occasioned directly by violent external and "visible means which solely and independently of any other "cause results in death or permanent total disablement."

Under the general conditions of the policy, by clause 4, payment of the permanent total disablement benefit was made conditional upon such disablement being established to the satisfaction of the underwriters within 12 months after the accident in respect of which a claim is made.

Under clause 2 the claimant was required to submit himself to reasonable medical examination, and before making a payment in this case the underwriters were provided with medical opinion. But the policy contained a further important provision, as follows. Clause 8: "No claim shall be paid hereunder for permanent total "disablement unless the claimant shall have given to under-"writers a signed declaration to the effect that he will take no "part as a playing member of any form of professional football "in the future and that in the event of infringement of this "condition he will be subject to a penalty of the amount paid "him in settlement of his claim." In purported pursuance of this clause the underwriters took an undertaking from the defendant dated August 25, 1956, and on August 31, 1956, the union received £500 which was forthwith passed on without deduction to the defendant in settlement of the claim under the policy.

The policy itself appears to be ill-written or inaccurate in several places (for example, "Football League" for "Football "Association"), and it is further accepted that the document which the defendant signed was not an appropriate document under clause 8 and was less favourable to the defendant in his present resistance to this claim against him than the appropriate document would be. It was therefore properly agreed without more formal consideration of rectification that the undertaking given on August 25, 1956, should be treated as being as follows: "I, Brian Magowan Moore of 7 Roman Road, East Ham, E.6, "agree to accept from Lloyd's underwriters (*per* L. Hammond "& Co. Ltd.) the sum of £500 in full satisfaction and discharge "of all claims under the Association Football Players' Accident "Insurance Scheme 1954/55, in respect of my injury which "occurred on or about December 26 last. In consideration of "the above payment I hereby declare and agree that I will take "no part as a playing member of any form of professional football in the future and that in the event of infringement of this "condition I will be subject to a penalty of the amount stated "above. (Signed) Brian Moore. Date August 25, 1956."

By this policy of insurance the union, which was concerned with the interests of players and trainers in professional football, was making provision for those members who in the circumstances stated were disabled from playing professional football and so earning a livelihood thereby. It was not a policy compensating merely for loss of faculties but for the effect of such on a member's capacity to earn money at football.

This case illustrates that a view, medical or otherwise, of total incapacity for football, however carefully and genuinely assessed, may be belied by events. Young and energetic footballers are perhaps a tough breed. Under economic pressure the defendant, without any improvement or alteration in the condition of his right eye and no doubt with skill, courage and good fortune, resumed employment as a professional player of association football with Cambridge United Football Club in December, 1956, that is, within four months of receiving the £500 benefit, on the basis that he was so permanently incapacitated as to make it impossible for him ever to resume such employment.

It may well be a difficulty or even a hardship for a lump sum to be refunded in such circumstances. The money may have been expended to bridge a period of unemployment, but before the defendant received the money he signed the undertaking, which I think must have brought to his mind the obligation to refund the money if he played professional association football again. He, I think, would recognise that the union was concerned with the capacity of a member to earn money as a professional footballer rather than with physical injury to a member in itself.

Clause 8 has the effect of making a payment for permanent total disablement conditional and not final. This was conceded in the argument for the defendant if the defendant at the time when he was asked to pay back the £500 he had received had been a member of the union, but subject to the defence that the plaintiff was seeking to enforce a penalty which the court would not sanction.

Apparently when the defendant commenced to play professional football again in December, 1956, he was not then a member of the union; the club for which he played was not in the Football League and was not a club of the highest class. The defendant played first for payment of a sum for each match, and when he had established himself he was engaged on a weekly but part-time basis. The defendant had, however, declared and agreed in consideration of the payment to him of the £500 as follows: "I will take no part as a playing member of any form "of professional football in the future," which I read as meaning "I will take no part in any form of professional football in the "future as a playing member" (or more briefly, "as a player"). So read I do not find it doubtful or ambiguous. The stipulation with regard to partaking in any form of professional football is as a playing member (or player) not as a spectator, or trainer or referee, manager, or in any other capacity. I cannot read it as referring in any way to the defendant's membership of the union.

There are many references in the policy to "member," both with a large "M" and a small "m" apparently indiscriminately, and the definition of "member" as a person of the male sex who is registered with the union as a member of the union, and the union by its title, would appear to include both players and trainers. But the words "playing member" are not together in the policy except in clause 8 and in that setting, as I read them, clearly have no reference to membership of the union.

I can see no ground for invoking the "contra proferentem" rule of construction, which cannot defeat the clear meaning of the words. (See *Love* v. *Pares*[1]; *Lindus* v. *Melrose*.[2]) It was suggested that if a man who had been compensated under this policy recovered and played again and remained a member of or rejoined the union the underwriters would not wish to insure him a second time and that that is the purpose of the clause. If further insurance was not desired it could have been quite clearly and simply stated or effected by the union.

The declaration and agreement continues: "and in the event "of infringement of this condition I will be subject to a penalty "of the amount stated above." The defendant has filed a counter-notice of appeal alleging that the plaintiff's claim herein is for the enforcement of a penalty. Paull J., rejecting this submission, held that "a penalty" meant a return or refund of the money paid on a certain event occurring or, alternatively, that the parties had reasonably fixed a sum by way of damages for breach of the undertaking.

Despite the unsuitability of the words and phrasing, the sense of the obligation the defendant entered into is that if he played professional football again he would refund the sum he had received on the basis that he could not so do. One isolated trial which served to show his unfitness for professional football would not, I think, have been held an infringement of the condition, if that had been the case. It would have served to show how right the decision was on which payment had been made, and so far as infringement was concerned it would be de minimis. The provision is not a technical but a practical one.

The requirement of repayment in this case does not appear to me to be unreasonable or unjust and, like the judge, I can see no reason why the court should not enforce it. Far from being extravagant or unconscionable it is the precise sum which the defendant had received from the underwriters and which he would not have received at all if the future could have been foreseen only four months ahead. If the sum claimed is to be regarded as damages it is, in effect, an agreed and fair pre-estimate of the loss which the underwriters have suffered. However, that way of putting it does not seem to me to be quite appropriate. Neither do I think the obligation is in any way in the nature of a threat held over the defendant in terrorem. The underwriters had no concern or desire to preclude the defendant from playing football for reward. They wished if he did so to be reimbursed that which they had paid on a basis proved to be false by events and no more.

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[1] (1810) 13 East 80.

[2] (1868) 3 H. & N. 177.

In *In re Apex Supply Co. Ltd.*[3] there was an agreement for the payment of a sum of money on a certain event which it was submitted was neither a sum claimed by way of liquidated damages nor penalty. Simonds J., after reviewing several authorities, came to the conclusion that no question of penalty versus liquidated damages arose but that there was a contract for the payment of a certain sum in a certain event, and that event having happened the sum was payable. That decision would fit the present case, for neither in that case nor this is there anything unconscionable or unjust and therefore unenforceable to be found.

In *Cooden Engineering Co. Ltd.* v. *Stanford*[4] this court by a majority took a different view and considered whether, applying the principles laid down in Lord Dunedin's speech in *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage and Motor Co. Ltd.*[5] the payment in dispute was a penalty.

The defendant's argument here has the advantage that the underwriters have chosen to call the payment they wish to recover a "penalty." Why they did so I cannot understand, but whilst they run a risk of being taken at their word the law looks at the substance of the matter and not at the words used, whether "penalty" or "liquidated damages." I would regard it, as the judge did, as a repayment of a sum in circumstances which are entirely equitable. It is in no way an imposition of a fine or penal payment, and if it has to be made to fall under one head or the other, it is to be regarded as a payment by way of damages for breach of an undertaking which is not unfair or unconscionable and therefore not a penalty.

I have not thought it necessary to go through the cases. The law on this subject has from time to time been extensively reviewed. It was the subject of an elaborate exposition by Jessel M.R. in *Wallis* v. *Smith*,[6] and of a shorter statement of Kay L.J. in *Law* v. *Redditch Local Board*,[7] and somewhat more recently it was considered in the House of Lords in *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage and Motor Co. Ltd.*[8]

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[3] [1942] Ch. 108; [1941] 3 All E.R. 473.

[4] [1953] 1 Q.B. 86; [1952] 2 T.L.R. 822; [1952] 2 All E.R. 915, C.A.

[5] [1915] A.C. 79; 30 T.L.R. 625, H.L.

[6] (1882) 21 Ch.D. 243, C.A.

[7] [1892] 1 Q.B. 127; 8 T.L.R. 90.

I regret to find myself at variance with the views of Devlin L.J., whose judgment I have read, but I find nothing in the authorities which precludes Paull J. and me in my turn from holding, as I have already expressed, that the provision for repayment "of the "amount stated above," that is the amount received and no more, is not in any way penal or punitive and therefore unenforceable in whole or in part. The underwriters' loss is £500, for that is the sum they paid on the basis of an incapacity which, if the facts could have been foreseen, did not exist, and they made provision for that possibility concurrently with the payment. This aspect alone differentiates *Cooden Engineering Co. Ltd.* v. *Stanford*,[9] in which all the members of the court regarded the sum claimed as being oppressive and penal in point of amount, in which view I would respectfully concur.

There is another defence adumbrated in the counter-notice to the effect that the policy sought to impose restrictive conditions upon the defendant greater than are reasonably necessary for the protection of the underwriters or in the interest of the public, and therefore the conditions were invalid and unenforceable. No argument was advanced to this effect and nothing was said in the judgment about it. I do not know why it was raised even on paper.

I would allow the appeal and enter judgment for the plaintiff for £500.

DEVLIN L.J. The defendant, Brian Moore, is or was a football player of some distinction and in 1955 he was playing as a full-time professional for West Ham, a well-known club. On December 26, 1955, he suffered an accident which injured his right eye. As a member of a body, referred to in this case as the union, he was insured under a policy against permanent total disablement. The sum of £500 was payable to him, (1) if within 12 months after the relevant accident it was established to the satisfaction of the underwriters (a) that he had been disabled from playing association football for six consecutive months, and (b) had become so permanently incapacitated as to make it impossible for him ever to resume employment as a professional player of association football; and (2) he signed a declaration to the effect that he would take no part as a playing member of any form of professional football in the future and that, in the event of infringement of this condition, he would be subject to a penalty of the amount paid to him in settlement of his claim.

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[8] [1915] A.C. 79.

[9] [1953] 1 Q.B. 86.

The defendant did not play professional football in the six months following his accident and towards the end of the period he was examined by doctors on his own behalf and on behalf of the underwriters. It was found that he had a 90 per cent. loss of vision in his right eye and that this loss was permanent. On May 15, 1956, the underwriters' doctor reported to them that he agreed with the defendant's doctor that the defendant "is "permanently and totally disabled from taking any further part "in professional football." This last statement goes beyond the medical province. Underwriters had to consider whether the loss of an eye—for they accepted it as that—made it impossible for the defendant ever to resume employment as a professional player. They appear to have had in mind a case of a player who played very well for Chelsea with one eye, and of another who played for England. Clearly, as indeed events in this case showed, it is not impossible to play professional football with one eye only; but it may very well be dangerous and unwise to do so. If the claim had been resisted, it would have been necessary to determine just what is meant by "impossible." But the underwriters took the liberal view and on August 25, 1956, they paid up. They obtained, of course, the signed declaration which, after rectification as agreed, follows the words I have set out.

In these circumstances one can understand that underwriters felt strongly about it when four months later they heard that the defendant was playing professional football again. The defendant says that when he took the money he intended to give up football. But he spent all the money and then found that it was difficult to get another job. There are always minor clubs keen to have as part-time players stars or distinguished players who are no longer fit enough for first-class football. Cambridge United is a minor club, and in December, 1956, they got in touch with the defendant and offered to find a job for him if he played on a part-time basis. At first the defendant only got a fee for the match but now he is employed at £16 per week. He says that he regarded his undertaking as one which required him to pay the money back if he became a full-time professional in a league club as opposed to a part-time professional in a non-league club.

So the underwriters now sue under the signed declaration to recover the £500 and in this appeal we have to consider two points upon the construction of that document. The material words are: "I hereby declare and agree that I will take no part "as a playing member of any form of professional football in the "future and that in the event of infringement of this condition "I will be subject to a penalty of the amount stated above"—that is, £500.

The first point is what is meant by taking "no part as a "playing member of any form of professional football." The second point is whether "the amount stated above" is correctly described in the document as a penalty for the infringement of the undertaking. If it is, it is conceded that the underwriters cannot enforce it. But it is argued that it is either money payable on an event or upon the true construction of the document a sum agreed as liquidated damages.

On the first point, everyone is agreed that the term "a "playing member of any form of professional football" is ungrammatical, ill-chosen and obscure. In the opinion of the judge, apart from any special rule of construction, the phrase is best interpreted as "a member of a team playing professional "football"; and on that interpretation the undertaking has been broken. I agree that that is the most sensible interpretation to give the words, and I do not on this point wish to add anything to that which has been said by Sellers L.J. The judge has, however, held that the application of the contra proferentem rule leads to a different construction which exonerates the defendant. I am not prepared to say that in this the judge is wrong, though, if I were to go into the point, I should want to invoke a rule of construction rather wider than the contra proferentem. This undertaking and the clause from which it springs are most unusual impositions to put upon an assured. Insurance policies are concerned with events; insurers either pay or do not pay the sum assured according to whether or not the event has happened; they do not normally exact undertakings from the assured about his future behaviour once he has got the money. The money that they pay out under a policy of this sort is obviously intended to be spent as soon as the assured gets it, it will be his only support while he is looking for another means of livelihood. I think that it can be strongly argued that if underwriters want to get the money back again on the happening of a certain event, they must define the event in clear and unambiguous terms so that the assured can know exactly what he can and cannot do. If they do not do that, they cannot rely upon the promise at all, just as they could not rely upon an exception in their favour unless they express it in clear and unambiguous terms. They must phrase it, as Romer L.J. said in *Houghton* v. *Trafalgar Insurance Co. Ltd.*,[10] so that " the motorist knows exactly where he stands." But I prefer to decide this case upon the other point of construction on which I have arrived at a clear view in the defendant's favour. Although the view is clear in my own mind, I express it with considerable diffidence since I am differing not only from my brethren in this court but also from the judge below.

In the contract which we have to consider, underwriters have asked for a penalty for breach of contract. So the onus is on them to satisfy the court that they did not mean what they said. That is the ordinary rule; and in particular it has been held to be applicable to one who wishes to say that by penalty he meant damages: see *Willson* v. *Love*[11] (*per* Lord Esher M.R.) and *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co. Ltd.*,[12] *per* Lord Dunedin. It is argued in the first place that they must have meant that the money should be a sum payable on an event.

If a man says: " If I play football again, I will pay you £500," his only promise is a contingent promise to pay. If he says: " I will not play football again and, if I do, I will pay you £500," the practical result may in the end be much the same, but he is making two promises instead of one, the main promise absolute and a supplementary promise contingent as before. In the former case, if he plays football again, he breaks no promise. In the latter case he does. In the latter case the promisee could in suitable circumstances obtain an injunction to enforce the promise; in the former case there is no promise, except that of payment to be enforced. Apart from legal consequences and sanctions there is a difference which honourable men observe; in the one case he has pledged his word and in the other case he has retained full liberty of action.

The two cases are therefore quite different with different consequences, and I know of no way in which the difference between them can be recognised except by looking at the language the parties themselves have used. The language of this contract is as plain as a pikestaff. It is said with truth that the underwriters cannot really care whether the defendant plays football again or not, and that they could get all that they really want by providing

[10] [1954] 1 Q.B. 247, 250; [1953] 3 W.L.R. 985; [1953] 2 All E.R. 1409, C.A.

[11] [1896] 1 Q.B. 626, 630, C.A.

[12] [1915] A.C. 79, 86, 89.

for the payment of money on an event. If so, why did they ask for and obtain a promise? If words are not rectified, the parties' rights must depend upon the language they actually use and not upon that which they might have used if they had realised that there was a simpler and better way of achieving what they really wanted. It is well settled that if there are two ways of making an arrangement—one clumsy and complicated which avoids a penal statute and the other simple and elegant which falls within it—the clumsy and complicated transaction cannot be brought within the statute by means of an argument that the other way would have been simpler and better. The reverse must also be true. If there are two legal ways of achieving the same result, the parties themselves must choose the way they want and signify their choice by the form they use. The court will not then re-form the contract they have made either to their advantage or to their disadvantage.

For these reasons, this contract cannot, in my judgment, be rewritten as a contingent promise to pay on the event of the defendant's playing professional football. It is argued in the alternative that on the language the parties have used the money is payable on an event, the event being the infringement of the condition. This argument cannot be sound. If it were, every penalty clause would have been enforceable from the beginning of time. In *Cooden Engineering Co. Ltd.* v. *Stanford*[13] it was held by this court that where money was expressed as being payable on an event and that event was also a breach of contract, if the sum was penal in amount it could not be recovered. That was a decision of the majority of the court, Jenkins L.J. dissenting, and there had previously been a difference of judicial opinion on the point. The facts in the present case are stronger against the plaintiff's contention than those in *Cooden Engineering Co. Ltd.* v. *Stanford* in two respects. First, in the present case, the sum is expressed as a penalty. Secondly, in the present case, the breach is the only event upon which the sum is payable, while in *Cooden Engineering Co. Ltd.* v. *Stanford* the sum was payable in a number of events of which one was also a breach. The second respect alone is sufficient to show that the plaintiff's contention gets no support even from the minority view. Jenkins L.J. said[14]: "It remains to consider the first and "more difficult question whether (being, as I have held, penal in "point of amount) the sum payable on determination of the

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[13] [1953] 1 Q.B. 86.

[14] Ibid. 109.

" hiring under clause 11 is a penalty in the relevant sense at all. " In order to be such, the sum in question must, as I understand " the law, be (as I have already described it) a sum which the hirer " undertakes to pay to the owners in the event of, and in respect " of, some breach by the hirer of the terms of the hire-purchase " agreement. If the agreement contains a provision of that " description, and a breach on the part of the hirer ensues, and " the owners sue for payment of the sum stipulated to be paid in " respect of such breach, then no doubt arises the question of " penalty or no penalty, turning on a comparison between the " stipulated sum and the damages capable of flowing from the " breach or breaches in respect of which the stipulated sum is, " according to the terms of the agreement, expressed to be payable. But the provision here in question does not appear to " me to answer that description. Clause 11 provides for the " determination of the hire in a number of different events and " in some of these events it enables the hiring to be determined " by a specified notice from the owners to the hirer, while in " others of them it causes the hiring to determine automatically."

Then it is said that the essential feature in this case, which differentiates it from all precedent cases, is that the obligation in this contract is not to pay but to repay the £500. It is no doubt convenient to talk of repayment in the circumstances of this case, but it is nonetheless a terminological inexactitude and one which the contract does not itself use. If a distinction is to be drawn between repayment and payment, repayment must mean the handing back of a sum which the payee has never in law been entitled to treat as his own because it has been paid under a mistake of fact or as a deposit or for a consideration which has wholly failed or for some similar reason. This sum was paid to the defendant upon an event and in exchange for a promise. When paid, it was due absolutely and without qualification, and nothing has happened since that has altered the character of the payment. If the defendant now has to pay £500 to the plaintiff, it is not because the plaintiff has shown that he was never truly liable to pay that sum to the defendant but because something has happened which has created a new liability on the defendant to pay a like sum to the plaintiff.

The same point is put in another way when it is argued that, since the plaintiff was liable only in the event of permanent total disablement and since events have shown that the defendant never was totally disabled, his promise to pay it back must be enforceable. This argument appears to me to put underwriters in a dilemma. Either the word "impossibility" in the policy is to be strictly construed or it is not. If it is not, if the definition in the policy is satisfied when the assured shows that on medical advice and with due regard to his own health and safety it is impossible for him to play professional football again, then the claim was a good one and properly met. If it is to be construed strictly as physical impossibility, then the claim was a bad one, but the underwriters paid it with their eyes open. Conceivably they might have made some sort of conditional payment pending some further proof or disproof of permanent total disablement. But they sought to protect their interests, not by making a qualified or conditional payment but by obtaining an undertaking. Without this undertaking they would have no cause of action at all, so now their rights depend solely on the undertaking and their remedy must be for the breach of it.

This leads to the alternative case made on behalf of the plaintiff that the £500 can be recovered as liquidated damages. The law on this point is well settled and is summarised by Lord Dunedin in the *Dunlop* case.[15] The £500 must be a genuine covenanted pre-estimate of damage; it must not be imposed in terrorem or be extravagant and unconscionable in amount in comparison with the greatest loss that could follow from the breach. If, as the defendant submits, his resumption of football caused the underwriters no injury so that they could not recover more than nominal damages for the breach of contract, the £500 must be a penalty in reality as well as by description.

The judge considered that the damages for the breach would be substantial because underwriters might in certain circumstances have to pay out a second £500. I should have thought with respect that the risk of having to pay £500 can only properly be estimated at something less than £500; £500 is compensation for the certainty. But it is sufficient to say that this risk only arises if the promise be construed, as the judge construed it, as one by the defendant not to play professional football as a member of the union, for it is only if he is a member of the union that the risk can arise again. If the promise is not so construed, the defendant has not broken it and is not liable to pay anything, either as a penalty or as liquidated damages. This point must therefore be considered on the other construction on which there is no possibility of the underwriters suffering any substantial damage under this head.

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[15] [1915] A.C. 79, 86.

In this court it has been argued that the underwriters would not have paid the money except in exchange for the promise and therefore that the amount of their payment must be taken as the measure of the damage which they have suffered. This is not the law. Damages are not measured at the price which the aggrieved party has thought it worthwhile to pay for the undertaking he has obtained; they are measured by the harm done to him by the breach. They are to be estimated as the sum necessary to put him in the same position as if the contract had not been broken, not in the same position as if the contract had not been made. By this argument the underwriters are seeking to treat the case as analogous to one in which the consideration for the payment had wholly failed; apart from other objections, the undertaking was only part of the consideration for the £500.

There is, therefore, no evidence of any direct damage flowing from the breach. But in the *Dunlop* case [16] it was held that for the purposes of this branch of the law indirect as well as direct damage must be considered. In that case the sum was payable for breach of an undertaking given by the buyer to the seller of goods not to sell them below list price. The sale below list price did the seller no direct damage, but it was held to damage him indirectly. Lord Parker of Waddington put the point succinctly when he said [17] that the damage consisted "in the disturbance "or derangement of the system of distribution by means of which "the appellants' goods reach the ultimate consumer."

The most that can be said here by way of comparison is that underwriters are interested as a matter of principle in paying only claims for genuine permanent total disablement. Is that the sort of thing that Lord Parker would have had in mind? In my opinion it is not. A system for the distribution of goods is a concrete thing capable of commercial injury; a rule or principle whereunder only just claims are met is abstract. If underwriters can be said to have a "system" of paying only claims for permanent total disablement within the meaning of the policy, that system was not disturbed or deranged by the assured's act in playing football again. I can only repeat the reasoning I have already used. If the test of "impossibility" is the strict one, the underwriters' loss was caused by their own act in paying a claim that they knew not to be within the policy. If the test is the liberal one, then payment of a good claim cannot cause disturbance or derangement of any system. Either way the defendant's act in playing football has caused the underwriters no injury. All he has done is to demonstrate as a fact something which everybody at all material times knew to be the fact, namely, that he was physically capable of playing football again if he wanted to.

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[16] [1915] A.C. 79.

[17] Ibid. 99.

If this reasoning be dismissed and if it becomes necessary to examine all the circumstances in order to see whether the plaintiffs' real object was to compensate themselves for a loss or to deter the defendant from a course of action, I entertain no doubt that it was the latter. I am satisfied that their intention, so far as it can be inferred from the material before the court, was to exact a penalty. Clearly underwriters cannot care at all whether the assured plays football or not. Why, then, do they demand the promise? Theoretically it is futile for underwriters to require of a man a promise that he will not perform the impossible. But in practice, as this case shows, claims that fall short of proof of impossibility may be made and met. Underwriters are not interested in whether the assured plays football again but they are interested in diminishing the number of claims they have to meet. A very good way of doing that is to demand, as a sort of guarantee, a promise that the assured will not play again; playing is his livelihood, and if he has any real capacity left for it he will not sell it for £500. I cannot see that the promise is of any use to underwriters except as an instrument for restricting claims. But it is not of great use for that purpose unless it has a sanction and the sanction is the penalty prescribed. I can see no reason at all for thinking that the object of this clause is not expressed clearly and precisely in the language which the underwriters themselves have used.

In saying this I imply no criticism of underwriters. They are perfectly open about what they are doing. They do not even seek to veil the word "penalty." They might keep claims down by insisting on a literal fulfilment of the definition of "permanent "total disablement," and then the undertaking would be of no added use to them. They do it instead—and no doubt more satisfactorily for all concerned—by taking a more liberal view of the definition and seeking to penalise claimants who take money when they are still fit for professional football and prepared to play it. Unfortunately for themselves, underwriters have chosen a way which the law does not permit them to enforce. It does not help them if they are not acting unconscionably in this particular case. The meaning and effect of the clause, as Lord

Dunedin said in the *Dunlop* case,[18] has to be considered as at the date of the contract and not at the date of the breach. It has, moreover, to be tested in the light of its potentialities and not by speculation about how decent underwriters might be expected to use it. It could be used extremely harshly. Under it a man who years after his accident and after he has spent the benefit he has received has taken payment for a single game might be faced with a demand that might ruin him. It is because it is capable of such harsh use that equity deems a penalty clause to be unconscionable unless it can be justified by showing that the penalty bears a reasonable relation to the injury done by the breach and is a genuine estimate of the damage occasioned.

I would therefore dismiss the appeal and uphold the judgment for the defendant. Since it has appeared from this case that underwriters have now adopted a new form of undertaking which does not use the word "penalty" and which may in the future come up for consideration, I think it wise to say that I have not formed any opinion about the construction of the new form. Clearly, it places underwriters in a better position than they are in in the present case, for the burden will then be on the assured to show that the payment is in truth a penalty though not so described. Whether he can successfully discharge that burden may have to be determined in some future case. I think it wise to say also that, although in the course of this judgment I have canvassed alternative meanings of the word "impossibility" in the policy, I have reached no conclusion about the true meaning.

SLADE J. I agree with the judgment of Sellers L.J. It is clear from clause 1 of the policy dated August 8, 1955, that the sole basis of the payment of £500 to the defendant was that the injury he sustained had occasioned him "permanent total "disablement" as defined in definition clause 4 of the policy. By definition clause 4, "permanent total disablement" is deemed to have arisen if, as a result of his injury, the member has been disabled from playing association football for six consecutive months "and has become so permanently incapacitated "as to make it *impossible* for him ever to resume employment "as a *professional* player of association football." General condition 4 provides the machinery for establishing permanent total disablement to the satisfaction of the underwriters so that payment can be made after the expiration of the period of six months.

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[18] [1915] A.C. 79, 87.

General condition 8 gives the necessary protection to the underwriters in case future events should falsify the medical certificates (see general condition 2) which had established to the satisfaction of the underwriters that the defendant had in fact suffered permanent total disablement. The effect of general condition 8 is, as Sellers L.J. has pointed out, to make a payment for permanent total disablement conditional and not final. The best evidence of falsification by subsequent events would of course be that the defendant had achieved the "impossible" by resuming employment as a professional player and by actually playing professional football.

The policy was a contract between the underwriters and the union, albeit one made by the union for the benefit of its members, of whom the defendant was one.

General condition 8 provides that no claim for permanent total disablement shall be paid until the claimant has given to the underwriters a "signed declaration." It does not mention the word "agree." The document this court has to construe *does*, however, use the words "I hereby declare *and agree*."

In the light of the sole purpose for which this document was required by the underwriters, and for which it came into existence, namely, to enable them to recover their money if the "permanent" total disablement turned out to be merely temporary, I am unable to construe the words "I hereby declare and "agree that I will take no part as a playing member of any form "of professional football in the future" as imposing a contractual obligation upon the defendant never again to play professional football.

The sole concern of the underwriters, for whose protection the document alone came into existence, was not to stop the defendant from playing professional football again but to recover their £500 if he did so and thereby established conclusively that he had never at any time been *permanently* totally disabled from doing so.

It seems to me quite unrealistic to construe the document as imposing a *contractual* ban upon the defendant from playing professional football again. I should have thought that the underwriters would welcome his doing so, since that was their only hope of recovering their £500. They certainly could not recover it, however fit the defendant became to play professional

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football again, if he refrained from playing it or if he played football again but confined himself to the amateur game.

I would allow this appeal and enter judgment for the plaintiff for £500.

Appeal allowed. No application was made for costs.

Solicitors: *William Charles Crocker; Vizard, Oldham, Crowder & Cash for Wild, Hewitson & Shaw, Cambridge.*

J. D. P.

CLAPHAM *v.* NATIONAL ASSISTANCE BOARD.

1961
March 1.

Lord Parker C.J., Winn and Widgery JJ.

Bastardy—Affiliation order—National assistance—Complaint by mother—Appeal against affiliation order allowed by quarter sessions on the merits—Subsequent complaint by National Assistance Board—Whether entertainable—National Assistance Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 29), *s.* 44.

On February 18, 1959, on a complaint under section 1 of the Affiliation Proceedings Act, 1957, by the mother of an illegitimate child, justices adjudged the defendant to be the putative father of the child and made an affiliation order against him. The defendant, who had not given evidence before the justices, appealed to quarter sessions where he gave evidence which was supported by that of another witness. Quarter sessions allowed the appeal on the merits and set aside the affiliation order. In August, 1960, the National Assistance Board, which had given assistance under Part II of the National Assistance Act, 1948, by reference to the requirements of the child, laid a complaint against the defendant applying under section 44 of that Act[1] for a summons to be served on the defendant under section 1 of the Act of 1957.[2] The justices, despite a submission on behalf of the defendant that they had no jurisdiction, heard further evidence and, holding that there was corroboration of the mother's evidence, made an affiliation order against the defendant. The defendant appealed, contending, in reliance on the words "shall in all other respects . . . proceed as "on an application made by the mother" in section 44 (3) of the Act of 1948, that the right of the board under section 44 was merely a right to apply for a summons, and that on the hearing of the complaint the board had no better right than the mother so that, since the decision of quarter sessions on the merits was final and the substantive issue between him and the mother was settled, the justices ought not to have proceeded:—

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[1] National Assistance Act, 1948, s. 44: "(1) The following provisions "of this section shall have effect "where—(*a*) assistance is given under "Part II of this Act by reference to "the requirements of an illegitimate "child . . . (2) If no affiliation order "is in force, the board . . . may "within three years from the time "when the assistance was given . . . "make application to a court of summary jurisdiction having jurisdiction in the place where the mother "of the child resides for a summons "to be served under section 3 of the "Bastardy Laws Amendment Act, "1872. (3) In any proceedings on "an application under the last foregoing subsection the court shall hear "such evidence as the board . . . "may produce, in addition to the "evidence required to be heard by "section 4 of the said Act of 1872, "and shall in all other respects . . . "proceed as on an application made "by the mother under the said "section 3."

Held, that the right of the board under section 44 of the Act of 1948 was not limited to the right to apply for a summons, but was an independent substantive right, independent and separable from any right which the mother would have had, to obtain an affiliation order, and at no stage did the board step into the shoes of the mother. The issue between the defendant and the board, therefore, had not been determined and the justices had jurisdiction to hear the board's complaint.

National Assistance Board v. *Mitchell* [1956] 1 Q.B. 53; [1955] 3 W.L.R. 591; [1955] 3 All E.R. 291, D.C. and *National Assistance Board* v. *Tugby* [1957] 1 Q.B. 506; [1957] 2 W.L.R. 316; [1957] 1 All E.R. 509, D.C. applied.

Per curiam. The application referred to in section 44 (3) is the application for a summons, and the opening words "In any "proceedings on an application under the last foregoing subsection" should be interpreted as meaning "in any proceedings arising out "of an application for a summons"; similarly, the last words of the subsection "proceed as on an application made by the mother" mean that the court should "proceed as on a complaint arising out "of an application made by the mother" under section 1 of the Act of 1957 (post, p. 88).

Case stated by West Riding of Yorkshire justices sitting at Ossett.

On August 3, 1960, a complaint was laid by the National Assistance Board against the appellant, James Willie Clapham, that a certain woman alleged that he was the father of an illegitimate child born on December 28, 1958, of which she was the mother and that, assistance having been given under Part II of the National Assistance Act, 1948, on July 25, 1960, and divers other days by reference to the requirements of the child, the board applied under section 44 (2) of the National Assistance Act, 1948, for a summons to be served on the appellant under section 1 of the Affiliation Proceedings Act, 1957.

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[2] Affiliation Proceedings Act, 1957, s. 1: "A single woman . . . who has "been delivered of an illegitimate "child, may apply by complaint to a "justice of the peace for a summons "to be served on the man alleged by "her to be the father of the child."
S. 4: "(1) On the hearing of a "complaint under section 1 of this "Act the court shall hear the evidence "of the mother . . . and such other "evidence as she may produce, and "shall also hear any evidence tendered by or on behalf of the defendant. (2) If the evidence of the "mother is corroborated in some "material particular by other evidence to the court's satisfaction, the "court may adjudge the defendant "to be the putative father of the child "and may also . . . proceed to make "against him an order . . ."

The following were among the facts found by the justices. The mother gave birth to an illegitimate child on December 28, 1958, and national assistance was first paid by reference to the requirements of the child under Part II of the National Assistance Act, 1948, on January 12, 1959, and thereafter had been paid weekly. On February 18, 1959, the same court heard a complaint by the mother against the appellant under section 1 of the Affiliation Proceedings Act, 1957, when evidence was given by the mother and a statement made to the court by the appellant but no other evidence was given, and the court adjudged the appellant to be the putative father of the child and made an affiliation order. The appellant appealed to quarter sessions and his appeal was heard on March 16, 1959: evidence was given by the mother and on her behalf by her mother and a police constable. The appellant gave evidence and evidence was given on his behalf by another person. Quarter sessions allowed the appeal, with the result that the affiliation order was set aside. The board was not a party to the proceedings before the justices on February 18, 1959, or to the subsequent appeal. There was no affiliation order in force relating to the child either on August 3, 1960 (the day when the board's complaint was made) or at the date, October 12, 1960, when the justices heard that complaint.

It was contended by the appellant, inter alia, that the mother had applied to the justices for a bastardy order in respect of a male child born to her and alleged that he was the father; that on that allegation being put to him, he declined to have the matter dealt with by the Ossett borough justices; that the justices having proceeded to hear the case had made an order in favour of the mother; that he appealed to quarter sessions on the grounds (1) that the finding was contrary to the weight of the evidence, (2) that there was no or not sufficient evidence, and (3) that he was not the father of the child; that his appeal was upheld at quarter sessions and was, therefore, a finding "on "the merits" of the case; that where a matter had been before quarter sessions and the appeal had been dismissed or upheld on its merits, the decision of quarter sessions was final and that, the decision of quarter sessions being final no other proceedings could be brought before the justices in respect of the complaint. It was submitted that the mother might make any number of applications to the justices provided that, if her first application be dismissed on its merits, she produced fresh evidence which should be of a weighty or serious kind, but that where her claim had been dismissed on appeal to quarter sessions on its merits that decision stood and was res judicata and no further proceedings before the justices could be brought in respect of that complaint; that the main purpose of section 44 of the National Assistance Act, 1948, was to protect the interests of the board where monetary assistance had been given to a person who for some reason had failed to take proceedings before the justices and then found herself out of time; that the main purpose of the Act was to protect public revenue and to provide machinery for recovery of sums paid to persons in need; and that the Act was not designed to create fresh causes of action or to enable the board to step in and bring proceedings on behalf of a person who had already exercised her legal rights and remedies and had been subject to a contrary decision.

It was contended by the board that assistance was in payment by reference to the requirements of the child; that the appellant was the father of the child; that corroborative evidence of that was given by persons other than the child's mother; that no affiliation order was in force in relation to the child; that the board's right of action under the National Assistance Act, 1948, was separate and distinct from the mother's right under section 1 of the Affiliation Proceedings Act, 1957; that section 44 was a financial section giving the board power to recover expenses; that that power could not be derogated by virtue of the acts, omissions or conduct of the mother or any other person or by any decision to which the board had not been a party; that the fact that the mother had herself taken action against the appellant under section 1 of the Act of 1957 and had obtained an affiliation order and that that order had been set aside by quarter sessions in no way fettered the board's right of action under section 44 of the Act of 1948; that even if further action under the Act of 1957 by complaint on the part of the mother might be effectively barred by the decision of quarter sessions, that decision neither barred the rights of the board nor relieved the board from carrying out its duties under the provisions of a different statute, namely, the Act of 1948; that section 44 of the Act of

1948 contained its own conditions which had to be satisfied in order to give jurisdiction to justices to whom a complaint had been made and in the present case all those conditions were satisfied; and that the board was in a position to tender material evidence which had not been tendered by the mother to quarter sessions.

The justices decided that they had jurisdiction to hear the case and, having proceeded to find further facts, held that there was corroboration of the mother's evidence and made an order adjudging the appellant to be the putative father of the child and ordering him to pay £1 10s. per week to the mother for the maintenance and education of the child until it should attain the age of 16 years.

The appellant appealed, the question for the opinion of the court being whether the justices had in fact jurisdiction to hear the board's complaint.

M. E. Bathurst for the appellant. Section 44 of the National Assistance Act, 1948, gives the National Assistance Board a right, separate and independent from the right of the mother, to apply for a summons to be served on the man alleged to be the putative father of the illegitimate child: *National Assistance Board* v. *Mitchell*[3] and *National Assistance Board* v. *Tugby*.[4] But section 44 is a procedural section, *per* Lord Goddard C.J. in *National Assistance Board* v. *Mitchell*,[5] and, on its construction, the separate and independent right of the board must be limited to the right to apply for a summons and to obtain the order, if any, which the mother might have obtained; the board has no separate substantive right to an order. In *Mitchell's* case[6] and *Tugby's* case[7] the court was concerned only with the right of the board to apply for a summons, and did not consider its rights on the hearing. [Reference was also made to *Oldfield* v. *National Assistance Board*.[8]]

The proceedings may be started either by an application by the board under section 44 (2) of the Act of 1948 or by a complaint by the mother under section 1 of the Affiliation Proceedings Act, 1957, but, once they have been started and the defendant is

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[3] [1956] 1 Q.B. 53; [1955] 3 W.L.R. 591; [1955] 3 All E.R. 291, D.C.

[4] [1957] 1 Q.B. 506; [1957] 2 W.L.R. 316; [1957] 1 All E.R. 509, D.C.

[5] [1956] 1 Q.B. 53, 56.

[6] [1956] 1 Q.B. 53.

[7] [1957] 1 Q.B. 506.

[8] [1960] 1 Q.B. 635, 643; [1960] 2 W.L.R. 423; [1960] 1 All E.R. 524, D.C.

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before the court, they are governed, in the case of proceedings by the board, by section 44 (3) of the Act of 1948, and, in the case of proceedings by the mother, by section 4 of the Act of 1957, but the substantive issue to be determined, the issue between the defendant and the mother, is the same in each case.

Reliance is placed on the words " the court . . . shall in all " other respects . . . proceed as on an application made by the mother " in section 44 (3). The summons brings the defendant before the court and the only satisfactory meaning which those words can be given is that, once the defendant is before the court, it must be assumed that the mother has brought him there. [Reference was also made to the judgment of Glyn-Jones J. in *National Assistance Board* v. *Mitchell.*[9]] The board's right to obtain a financial order against a defendant, therefore, is one which it has in the mother's right. Compare the right of the board under section 43 of the Act of 1948, in respect of which it has been held that a defence against a wife is a defence against the board: see *National Assistance Board* v. *Wilkinson*[10]; see also *Stopher* v. *National Assistance Board*[11] and *National Assistance Board* v. *Parkes*,[12] in particular *per* Romer L.J.[13]

On the hearing of the summons, therefore, the only substantive issue is that between the mother and the defendant, irrespective of who has brought the proceedings. In this case quarter sessions had given a decision on the merits of that issue. Such a decision is final and no further proceedings raising it may be brought: *Reg.* v. *Glynne.*[14] It follows that the justices should not have proceeded to hear the summons.

If the justices had jurisdiction to hear the summons, then it is conceded that there was evidence on which they could make the order.

J. R. Cumming-Bruce for the board. The justices were right in proceeding with the hearing. Section 44 of the National Assistance Act, 1948, gives the board a substantive right, separate from and independent of any right of the mother. The observation of Lord Goddard C.J. in *National Assistance Board* v.

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[9] [1956] 1 Q.B. 53, 59.

[10] [1952] 2 Q.B. 648; [1952] 2 T.L.R. 11; [1952] 2 All E.R. 255, D.C.

[11] [1955] 1 Q.B. 486; [1955] 2 W.L.R. 622; [1955] 1 All E.R. 700, D.C.

[12] [1955] 2 Q.B. 506; [1955] 3 W.L.R. 347; [1955] 3 All E.R. 1, C.A.

[13] [1955] 2 Q.B. 506, 524.

[14] (1871) L.R. 7 Q.B. 16.

Mitchell[15] was directed to subsection (3), which is clearly procedural, and not to the section as a whole, which is equally clearly substantive. Where a statute gives to a body such as the board a right, which it did not possess before, to apply for the remedy of an order for payment of money to it, it is a bold submission to say that the statutory provision giving that new right is merely procedural.

To hold that the only right of the board under section 44 is a right to apply for a summons and that, once a defendant is before the court, there is the artificial position that the board must be regarded as standing in the shoes of the mother, is inconsistent with the decision of this court in *National Assistance Board* v. *Tugby*.[16] The observations of Glyn-Jones J. in *National Assistance Board* v. *Mitchell*[17] indicate that the court cut down the meaning of the words "in all other respects . . . proceed as on "an application by the mother" in section 44 (3) so as to exclude the time limit relating to the mother's right. It is submitted that those words mean that the justices are under a duty to proceed in accordance with the requirements of subsections (1) and (2) of section 4 of the Affiliation Proceedings Act, 1957, that is, that they must hear the evidence of the mother and be satisfied that it is corroborated in some material particular.

[LORD PARKER C.J. So that the words "in any proceedings "on an application . . ." in subsection (3) of section 44 of the Act of 1948 must be read as "in any proceedings resulting from "or arising out of an application . . ."?]

Yes. Subsection (3) also requires the justices to consider such evidence as the board desires to tender: it would be extraordinary if, in relation to that evidence, they were bound to give effect to an estoppel arising out of proceedings between the mother and the defendant. Affiliation proceedings are not proceedings in rem (*Anderson* v. *Collinson*[18]), and there is no rule of evidence compelling justices to give effect to an estoppel arising out of such proceedings between other parties. The board is a different party from the mother and its rights are quite different.

Bathurst in reply. It is not the case for the appellant that the board stands in the shoes of the mother for all purposes. The board has three separate rights under section 44: the right to apply for a summons, the right to tender additional evidence and

[15] [1956] 1 Q.B. 53, 56.

[16] [1957] 1 Q.B. 506.

[17] [1956] 1 Q.B. 53, 59.

[18] [1901] 2 K.B. 107; 17 T.L.R. 425.

the right to have an order made in its favour. Apart from the special provision of subsection (3) in regard to evidence at the hearing the justices must proceed "in all other respects" as if the application had been made by the mother. If those words do not include an estoppel which could be raised against the mother, they are meaningless, for the board would have, in effect, a separate statutory right and cause of action quite apart from that of the mother. *Anderson* v. *Collinson*[18] was concerned with separate parties and different causes of action and should be distinguished.

LORD PARKER C.J. This is an appeal by James Willie Clapham, by case stated by justices for the West Riding of the County of Yorkshire, sitting at Ossett, from an order made by the justices on October 12, 1960, whereby they found that he was the putative father of an illegitimate child born on December 28, 1958, and ordered payment of weekly sums to the mother for the maintenance and education of the child.

The complaint was made by the National Assistance Board under their powers under section 44 of the National Assistance Act, 1948, they having paid national assistance by reference to the requirements of the child from January 12, 1959. The appellant's grounds of appeal, are, broadly speaking, that the justices had no jurisdiction in the circumstances of this case to make the affiliation order in question.

The short facts were these: the mother, as I have said, gave birth to this child on December 28, 1958. On February 18, 1959, the justices heard a complaint made by her against the appellant under section 1 of the Affiliation Proceedings Act, 1957. Evidence was given by the mother and a statement was made to the court by the appellant. The justices adjudged that he was the putative father of the child, and made an affiliation order against him. He then appealed to the appeals committee of quarter sessions, where the case was re-heard. Evidence was given again by the mother and also by her mother and two other witnesses. The appellant on this occasion gave evidence, and he was supported in what in effect was an alibi by another witness. The appeal was allowed on the merits and the affiliation order was set aside. Thereafter, as I have said, the National Assistance Board, having paid national assistance by reference to the requirements of the child, preferred a complaint on their own behalf. In those proceedings they called further evidence than the mother had been able to call on the previous occasion and in effect destroyed the alibi which the appellant had raised with success before the appeals committee of quarter sessions. The justices, on the evidence before them, holding that there was corroboration of the mother's story, made this affiliation order.

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[18] [1901] 2 K.B. 107.

Mr. Bathurst, for the appellant, admits that there was plainly evidence before the justices on which they were entitled to make the order, always on the assumption that they had jurisdiction. What is said, quite shortly, is that as between the parties to the original complaint, namely, the mother and the appellant, the decision of quarter sessions is final; it was a decision on the merits and as between those two parties the position is settled. The argument in the present case is that the National Assistance Board in effect stepped into the shoes of the mother and that, accordingly, the issue is settled as between the appellant and the National Assistance Board, and the justices ought not to have proceeded further.

The relevant provisions are to be found in the Affiliation Proceedings Act, 1957, and the National Assistance Act, 1948. Section 1 of the Affiliation Proceedings Act, 1957, provides: "A "single woman who is with child, or who has been delivered of "an illegitimate child, may apply by complaint to a justice of the "peace for a summons to be served on the man alleged by her "to be the father of the child." Section 2 deals with the time within which such an application can be made, and section 4, which is the well-known section, provides, by subsection (1), that the justices must hear the evidence of the mother and such other evidence as she may produce and shall also hear any evidence tendered by or on behalf of the defendant. Subsection (2) deals with corroboration, and provides: "If the evidence of the mother "is corroborated in some material particular by other evidence to "the court's satisfaction, the court may adjudge the defendant "to be the putative father of the child and may also, if it thinks "fit in all the circumstances of the case, proceed to make against "him an order (referred to in this Act as 'an affiliation order') "for the payment by him of" certain expenses and sums by way of maintenance.

The National Assistance Act, 1948, by section 44, gives the National Assistance Board certain rights as against a putative father. [His Lordship read subsections (1) (2) and (3) and continued:] I think that this much is clear and laid down by authority, that section 44 is giving to the National Assistance Board a wholly independent and separable right from that of the mother. Thus, in *National Assistance Board* v. *Mitchell*[1] it was held "that the board's right to apply for an order under the Act "of 1948 was entirely separate from the mother's right under the "Act of 1872; and provided that the board applied within three "years of the date on which they last gave assistance they were "entitled to apply for an order on proving that the children were "bastards in respect of whom an order could have been made "under the Act of 1872"; that was the Bastardy Laws Amendment Act, 1872, which was in force until the Affiliation Proceedings Act, 1957, was passed.

The same also appears from *National Assistance Board* v. *Tugby*[2] where again Lynskey J. said[3]: "The effect of section "44 is to give the board a right independent of and separable "from any right given to the mother by the Bastardy Acts, and "even though she herself has lost her right by effluxion of time "or otherwise by marriage to apply."

The argument raised on behalf of the appellant stresses the fact that in both those cases the independent and separable right which was held to exist in the National Assistance Board was merely a right to apply for a summons. The argument goes on that, once the justices come to hear the complaint, then, except that they shall hear such evidence as the National Assistance Board may produce, they shall, in the words of subsection (3) of section 44, "in all other respects . . . proceed as on an application "made by the mother under the said section" 1 of the Act of 1957. Accordingly, if I may summarise Mr. Bathurst's argument, he says, True, section 44 gives the board three separate rights: it gives them a right to apply for a summons even if the mother could not, either because she is too late or because she is no longer a single woman; secondly, the board have a right to tender evidence themselves; thirdly, they have a right to get an affiliation order in their favour. But again, to quote the words of subsection (3) "in all other respects" they have no separate rights, but they step into the shoes of the mother, and stepping into the shoes of the mother they have, so the argument runs, no better right than she would have if she had made the application. In the present case quarter sessions decided against the mother on the merits and she is bound by that decision. Accordingly, so it is said, the board is also bound by that decision and the justices had no right to hear and determine the case as they did.

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[1] [1956] 1 Q.B. 53; [1955] 3 W.L.R. 591; [1955] 3 All E.R. 291.

[2] [1957] 1 Q.B. 506; [1957] 2 W.L.R. 509, D.C.; [1957] 1 All E.R. 316.

[3] [1957] 1 Q.B. 506, 512.

I am quite unable to accept that argument. It seems to me clear, as I have said, that section 44 gives a new, independent substantive right to the National Assistance Board, and I am quite unable to accept the argument that that separate independent right is limited to a right to apply for a summons. It is a right, as it seems to me, to get an affiliation order made in their favour, independent of what right the mother would have had. True, in *Mitchell's* case [4] and *Tugby's* case [5] the wording in the judgments was limited to an independent and separable right to apply for a summons, but in both those cases that was the question before the court. The court was not considering, and did not have to consider, whether the board had the further independent right to get an affiliation order in their own favour. It seems to me to a high degree artificial to say that, while there is a wholly separable and independent right to apply for a summons, yet, when the complaint is heard, that separate and independent right is limited in the way suggested. Full effect can be given to the words of subsection (3) of section 44 by treating the subsection as a purely procedural section. Indeed, that is how it was referred to by Lord Goddard C.J. in *Mitchell's* case,[6] where, having referred to subsections (2) and (3), he said [7]: "That seems to me to be a procedural section." It is true that he was referring to the whole section, but it is quite clear in the context that Lord Goddard C.J. was referring to subsections (2) and (3) of that section. I agree that subsection (3) is purely procedural and, as it seems to me, the words "and shall in all "other respects, but subject to the provisions of the next following subsection, proceed as on an application made by the "mother under the said section [one]" are clearly necessary to ensure that the justices, inter alia, should apply the principle that corroboration in some material particular is required and, indeed, to deal with the payment of expenses and maintenance save in so far as those provisions are altered by subsection (4) of section 44.

Accordingly, as it seems to me, the National Assistance Board have a quite independent and separable right from the mother not merely to apply for a summons but to obtain an affiliation order. At no stage do they step into the shoes of the mother, and the issue as between them and the putative father has not been determined, it having been long recognised that an affiliation order is not a proceeding in rem.

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[4] [1956] 1 Q.B. 53.
[5] [1957] 1 Q.B. 506.
[6] [1956] 1 Q.B. 53.
[7] Ibid. 56.

I would add only one further matter. Subsection (3) of section 44 is not, in my judgment, very happily worded. It begins by saying: "In any proceedings on an application under "the last foregoing subsection." The application referred to is, therefore, an application for a summons, and it seems to me that subsection (3) must be interpreted as meaning: "In any proceedings arising out of an application for a summons." Again, in the last two lines of the subsection the words "proceed as "on an application made by the mother under the said section "[one]" must mean that the court shall "proceed as on a "complaint arising out of an application made by the mother."

For the reasons I have endeavoured to state I have come to the conclusion that the justices were perfectly right and that the appeal should be dismissed.

WINN J. I agree. I desire to add only two short observations. The first refers to the wording of section 44 (3) which my Lord has discussed, and I pause only to observe that a somewhat similar anomaly is to be detected in the Affiliation Proceedings Act, 1957, because by section 1 the right is given to the mother to complain by summons, and section 4 deals with the hearing of a complaint under section 1, whereas the substance of the matter is that the hearing referred to in section 4 must be the hearing pursuant to the summons being issued. We have not investigated the matter, but it may be that originally such proceedings as these took the dual form of a finding as to paternity, and an adjudgment whether or not the man named in the woman's complaint was the father, followed by a complaint requiring that he show cause why he should not pay.

The other observation is this. Lest it might still seem odd to anyone that the National Assistance Board should be given a right to an order wholly independent of that of the mother of the illegitimate child—a similar right incidentally being given by section 26 of the Children Act, 1948, to local authorities—I would refer to the historical fact which emerges clearly from the judgment of Lynskey J. in *Tugby's* case,[8] that the Act of 1948 repealed the provisions of section 5 of the Bastardy Laws Amendment Act, 1873, an Act which itself modified the provisions of

[8] [1957] 1 Q.B. 506, 512.

section 8 of the Act of 1872. Thereby, in effect, the Act of 1948 constituted the National Assistance Board the successors to the Poor Law Guardians who, under the Act of 1873, always had an independent right to apply for a summons against a man in respect of a child which had become chargeable to the union or parish. They were entitled on proof being given as in the section provided to obtain from the justices an order that the man was the putative father and an order against him for payment of a contribution towards the maintenance of the child.

For these reasons I agree that the appeal should be dismissed.

WIDGERY J. I also agree.

Appeal dismissed. No application was made for costs.

Solicitors: *J. H. Milner & Son for Green, Williamson & Way, Wakefield; Solicitor, National Assistance Board.*

J. F. L.

CANE (VALUATION OFFICER) AND ANOTHER *v.* ROYAL COLLEGE OF MUSIC.

[LVC/1367/1958.]

C. A.

1961
Jan. 30, 31;
Feb. 1, 2, 14.

Holroyd Pearce, Harman and Davies L.JJ.

Rating—Science, literature or fine arts—Exemption—" Annual voluntary contributions "—College instituted for purposes of musical instruction and encouragement of music—Annual receipts of donations, gifts in kind, conditional and unconditional legacies, funds from trusts, government grants—Scope of " annual voluntary contributions "—Whether percentage of total income constituting " support " decisive in relation to society within spirit and letter of statute—" Supported . . . in part "—" Annual "—" Voluntary "—" Contributions "—Meaning—Government grants not annual voluntary contributions—Scientific Societies Act, 1843 (6 *&* 7 *Vict. c.* 36), *s.* 1.

Judicial Precedent—Ratio decidendi—Two reasons for decision—Both binding.

A college founded by Royal Charter in 1883 for the promotion of musical instruction and the encouragement of music as an art was supported throughout its history by an annual flow of benefaction of divers kinds. In each year there was a flow of subscriptions;

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cash donations; conditional and unconditional legacies; gifts in kind; covenants for or gifts of money donated to form a fund the interest on which was to be used as a prize or scholarship; funds from trustees under the terms of a deed to make payments to the college or under trusts giving the trustees a discretion to devote the funds at their disposal to one or other named institution or institutions within a generally described class; and government grants.

In 1898 the college was held to be exempt from rating as a society instituted for purposes of the fine arts exclusively, within section 1 of the Scientific Societies Act, 1843 [1]; but in 1956 the rating authorities sought to have its hereditament assessed, on the ground that the society was not "supported wholly or in part by annual "voluntary contributions" in satisfaction of the proviso to section 1.

The Lands Tribunal, construing "annual" in relation to the contributor and not the receiver, excluded from the total income of the college, as not constituting "annual voluntary contributions," all legacies; lump sums donated to form a fund, the interest on which was to be used as a prize or scholarship; scholarships for the maintenance of a pupil (as distinct from those to pay holder's fees to the college); prizes which a pupil could spend as he chose; payments by trustees under a trust deed to make a payment to the college; all gifts in kind; and government grants. The tribunal further added to the total annual income the proceeds of catering for collateral purposes, and of concerts held at the request of the local authority on the basis of indemnity and reimbursement. In the result the tribunal found, on its construction, that "annual "voluntary contributions" for the "support" of the college accounted for less than 2 per cent. of the total income, and held that that insignificant proportion could not be regarded as even partial support for the purposes of section 1 of the Act of 1843, and that the college was accordingly not entitled to exemption from rating. On appeal by the college:—

Held, allowing the appeal, (1) that "annual" contributions within the meaning of the section included gifts and legacies which came to the donee with sufficient regularity to entitle the donee to rely on them as a source of income year by year, although the donor might in every case be different (post, pp. 106, 119).

(2) That a contribution was "voluntary" if it was gratuitous, albeit it was received from a trust, the trustees of which were not free agents (post, pp. 109, 120).

(3) That where a contemporary capital endowment fell to be treated as a "contribution," the interest on it could not also be counted as an annual voluntary contribution in subsequent years (post, pp. 109, 120).

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[1] Scientific Societies Act, 1843, s. 1: ". . . no person or persons "shall be assessed or rated . . . in "respect of any land, houses, or "buildings . . . belonging to any "society instituted for purposes of "science, literature, or the fine arts "exclusively, . . . provided that such "society shall be supported wholly or "in part by annual voluntary contri- "butions . . ."

(4) That "support" of such a society included all benefaction which enriched it or furthered its objects or powers, or relieved it of a burden, or enabled it to perform its purposes in a more dignified manner; and, accordingly, gifts in kind, and scholarships or prizes not earmarked to pay the holder's college fees, constituted "support" (post, pp. 111, 121).

(5) That, accordingly, the society was supported in significant part by annual voluntary contributions, since a sufficient number of the items excluded by the tribunal (with the exception of government grants) could properly be treated, from the receiver's point of view, as "annual voluntary contributions." In particular, all gifts in kind; the capital sums of legacies, conditional or unconditional, and gifts or donations which came to the college with sufficient regularity to entitle it to rely on them as a source of revenue were in the year of receipt annual voluntary contributions, as were also grants from funds in the hands of trustees with discretionary powers, as and when such grants were received by the college.

Per curiam. If the nature of government grants were res integra, there would be much to be said for the view that they were annual voluntary contributions within the spirit and letter of the Act of 1843 (post, pp. 114, 122).

Per Holroyd Pearce L.J. In relation to a society so wholly within the spirit, intention and literal wording of the Act of 1843 as this college, the question whether it was supported in part by annual voluntary contributions was not to be decided by percentages (post, pp. 115 to 117).

London Library v. *Cane* [1960] 1 Q.B. 373; [1959] 3 W.L.R. 929; [1959] 3 All E.R. 726, C.A.; *Bradford Library Society* v. *Bradford Churchwardens* (1858) 1 E. & E. 88; *Savoy Overseers* v. *Art Union of London* [1896] A.C. 296; 12 T.L.R. 377, H.L.; *Battersea Borough Council* v. *British Iron and Steel Research Council* [1949] 1 K.B. 434; 65 T.L.R. 183, C.A. and *British Launderers' Research Association* v. *Hendon Borough Rating Authority* [1949] 1 K.B. 462; 65 T.L.R. 103; [1949] 1 All E.R. 21, C.A. applied.

APPEAL by case stated from a decision of the Lands Tribunal (Mr. Erskine Simes Q.C.).

The valuation officer appealed from a decision of a local valuation court for Central London on May 5, 1958, directing that the hereditament described as the Royal College of Music, Prince Consort Road, London, S.W.7, should be entered in the valuation list for the City of Westminster as "Exempt." The valuation officer contended that the college was not entitled to exemption from rating under the Scientific Societies Act, 1843, and that the hereditament should be assessed at values of £10,000 gross value and £8,330 rateable value; and on July 30, 1958, it was ordered that there should be a preliminary hearing on the point of law as to whether the college was so exempt. Accordingly, no evidence as to values was given at the hearing.

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It was admitted that the last three of the five conditions necessary to claim exemption under section 1 of the Act of 1843 were satisfied. The first, that it must be a society constituted for purposes of the fine arts exclusively, had been determined in favour of the college in *Royal College of Music* v. *Westminster Vestry*[2]; but the valuation officer formally reserved the right to question that decision if the present appeal reached the House of Lords. The sole issue argued was whether the college was supported wholly or in part by annual voluntary contributions.

The college was created and incorporated by Royal Charter in 1883 and its purposes as defined by the charter were as follows:

"First, the advancement of the art of music by means of a "central teaching and examining body charged with the duty "of providing musical instruction of the highest class, and of "rewarding with academical degrees and certificates of proficiency "and otherwise persons, whether educated or not at the college, "who on examination may prove themselves worthy of such "distinctions and evidences of attainment: and, secondly, the "promotion and supervision of such musical instruction in schools "and elsewhere, as may be thought most conducive to the cultivation and dissemination of the arts of music in the United "Kingdom; and, lastly, generally the encouragement and promotion of the cultivation of music as an art throughout our "Dominions."

The buildings stood on land demised to the college by the Commissioners for the Exhibition of 1851 for 999 years from June 24, 1890, at a nominal annual rent of £5, were originally erected from funds provided by one Fox, and had since been enlarged and improved at the expense of private benefactors.

The college received each year gifts of books and music, instruments, pictures and miscellaneous articles connected with its activities, but following the decision of the President in the *London Library* case [*London Library* v. *Cane*[3]] [in the Lands Tribunal] in respect of gifts of books to that Institution, the tribunal was satisfied that the value of such gifts in kind could not be treated as "annual voluntary contributions" within the statute.

The income of the college as shown in the balance-sheet for the year ended August 31, 1956, amounted to £72,155 and was derived, inter alia, from:

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[2] [1898] 1 Q.B. 809; 14 T.L.R. 351, C.A.

[3] (1958) 51 R. & I.T. 571, 576.

Annual subscriptions	£648
Donations and legacies	£300
Dividends and interest	£9,636
Fees from pupils	£32,406
Transfers from Astor Fund	£381
,, ,, Leverhulme A/c	£480
,, ,, Miscellaneous trusts fund	£10
,, ,, Ernest Palmer Fund	£240
Government grant	£14,125
Cash for prizes and maintenance	£113
Sundry receipts	£402
Junior Exhibitions fees	£1,922
Associated Board of Royal Schools of Music	£9,000
Grant from Palmer Fund for opera study	£200
Amount received for L.C.C. concerts	£77
Amount transferred from Patron's Fund	£80

That revenue account and that of the years from 1951 to 1957 both inclusive were analysed in tables appended to the college's reply.

There was no dispute before the tribunal that the annual subscriptions were properly to be regarded as annual voluntary contributions and that government grants should be excluded, in the light of the judgment of Jenkins J. in *Metropolitan Borough of Battersea* v. *British Iron and Steel Research Association*,[4] but for the college it was formally submitted that the decision was wrong so that the point might be open to the college in subsequent proceedings.

It was clear from the evidence that the item "Donations and "legacies" in fact included legacies only, and in relation to that item the tribunal followed and adopted the view expressed by the President in the *London Library* case (supra) that "they "are the antithesis of an annual voluntary contribution."

In the tables attached to the college's reply, in addition to annual subscriptions and donations and legacies, two further items, namely, annual contributions specified in Table B (*a*) (iii) and receipts from trusts whose trustees had discretion to apply income outside the college (Patron's and Palmer Funds) were included as annual voluntary contributions.

Table B (*a*) (iii) set out a list of prizes, scholarships and exhibitions in respect of which moneys had been received during the years 1951 to 1957, in some cases to found a prize or scholarship, in some cases to augment the fund providing a prize or scholarship and in some cases annual or periodical gifts for some prize or scholarship.

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[4] [1949] 1 K.B. 434, 457; 65 T.L.R. 183.

Eleven of those items related to legacies for those purposes and in respect of those, Mr. Ronald Bell, counsel for the college, accepting that the tribunal should follow the President's decision in the *London Library* case, reserved the right to contend thereafter that that decision was incorrect. Certain of the items included in Table B (*a*) (iii) he did not seek to contend should be regarded as annual voluntary contributions, but he did seek to include a number, briefly described as follows:

1. The Parry Scholarship—an annual payment made by the trustees of the Parry Little Organ Book Fund of the royalties received by them in the year from the sale of a work entitled "A "Little Organ Book," invested by the college and added to the foundation fund, which was used for the purpose of an open scholarship known as the Hubert Parry Scholarship which covered the fees of the holder. 2. The Morrison Prize—an annual prize, to be awarded to the most distinguished pianist each year, of a sum representing the interest on £700 less 5 per cent. for administration and derived from two transactions both made on the same day: first, a straightforward covenant of £100 per annum for seven years, and secondly, an immediate loan to the college by the covenantor of £647 10s. free of interest repayable by annual instalments of £100 for a period of six years and a final instalment of £47 10s. 3. The McGown Prize, which consisted of a gift of £5,000 to be invested and the interest to be devoted to helping students of the college who were in need. 4. The Tankard Prize, derived from the interest on the sum of £500 which was given for the purpose. 5. The Somervell Prize—an annual prize of £10, representing the interest on £400 2½ per cent. Savings Bonds transferred to the college by the donor. 6. The Astor Fund—a sum of £16,700 given to the college in 1935 on trust to apply the income derived therefrom "for the benefit "and assistance of those of its pupils who in the judgment of "the director . . . it is desirable should receive financial assis-"tance in order to complete to the full advantage the courses "of instruction which they have commenced or of those who "having completed their courses of instruction the director . . . "considers it is desirable should receive financial assistance in "order to enable the full advantage of such courses to be obtained "when they leave the college." 7. The Blower Prize—the

interest on the sum of £171 13s. subscribed and invested in the names of the trustees who under a declaration of trust made in 1915 were to apply the income in providing an annual prize for proficiency in singing to a pupil or pupils of the college. 8. The Chappell Prize—an annual sum of £5 5s. given to the college by Messrs. Chappell for a prize to a piano pupil. The prize-winner was also given a medal by Messrs. Chappell. 9. The Eldee Exhibition, derived from the interest on a sum of money invested in the names of trustees "to assist female vocalists to "study, develop and receive training in their art either in the "United Kingdom or abroad." The holder was to be nominated alternatively by the Royal Academy of Music and the college. 10. The Leverhulme Fund—a grant of £500 per annum by the Leverhulme trustees to provide scholarships at the college. Part of those scholarships were in discharge of college fees and part for the maintenance of scholars during the college term. 11. The Lyttleton Scholarship—a grant by covenant of £120 per annum to be applied in establishing and maintaining a scholarship. 12. The Maas Prize—an exhibition of £10 per annum paid by trustees to the pupil of a school of music selected by the examiners appointed by the trustees, the sum to be appropriated to the cost of a year's instruction in the selected institution. 13. The Stern Prize—a sum of £5 5s. given annually by the Court of the Musicians' Company as trustees to a student of the violincello at the college to assist him in his studies. 14. The Warrender Prize—an annual gift of £5 from the Musicians' Benevolent Fund as trustees to be given to a student of the college "either "to help with music or towards travelling or other expenses at "the discretion of the Principal."

The two trusts of which the trustees had discretion to apply income outside the college were as follows: (1) The Patron's Fund, administered by the college as trustees under trust deeds of 1903, 1906, 1909 and 1912. The income of that fund was applicable to any of the purposes specified in clause 5 of the trust deed of 1912, which included the provision of concerts either at the college or elsewhere of works by selected British composers, the assistance of such composers in publishing approved works or obtaining performances of them, the assistance of British musical students by grants to aid them in advancing their musical education otherwise than by payments of fees at any musical college or academy in the United Kingdom. The deed provided that the fund was to be "primarily applicable for the benefit of . . . past "or present pupils of the college but the benefit thereof may be "extended to any other British subjects." The deed also provided that the income thereof was not to be brought into the general revenue account of the college.

(2) The Ernest Palmer Fund, similarly administered by the college as trustees under a trust deed of 1924. The income of that fund was applicable to all or any of the purposes specified in clause 3 of the trust deed, summarised as the maintenance of the opera theatre in the college and the performance of operas therein, and to the provision of exhibitions to be held by British subjects for opera training at the college, and the expenses of occasional rehearsals of opera for executive artists on the plan of the rehearsals held under the Patron's Fund.

The amounts appearing in the college accounts as from London County Council concerts and from catering represented the difference between the gross takings and the expenditure on those items.

For the valuation officer counsel contended that the gross takings from those two last sources, which in 1956 amounted to £77 for London County Council concerts and £8,196 for catering, should be taken into account in considering the income of that college. He further contended that funds for prizes and scholarships were for the benefit of the students rather than in support of the college, and dealt with each of the specific funds referred to above, emphasising the necessity of seeing that the college was supported by annual voluntary contributions at or about the date of the proposal. In the case of the Chappell prize, he raised the question whether it was not given rather as a trading advertisement; in the case of those funds which assisted in the maintenance of scholars, he contended that they were clearly assistance to the scholars rather than support of the college; and that the Patron's Fund and the Palmer Fund differed in no way from other invested funds of the college such as had been excluded by the Divisional Court in *Royal College of Music* v. *Westminster Vestry*.[5] For the respondent rating authority, the Westminster Corporation, the argument for the valuation officer was adopted and it was contended that the intention of the Act of 1843 could be derived only from its wording, which should be construed in the light of the decisions on it. It was pointed out that in none of the cases prior to the appeals against the present list had donations or legacies been claimed as annual voluntary contributions;

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[5] [1898] 1 Q.B. 304, 311.

that the donations giving rise to the funds claimed by the college as annual voluntary contributions in Table B (a) (iii) were really capital receipts and once-for-all gifts and not annual voluntary contributions; that the word "annual" indicated a necessary quality of recurrence; and that prizes and scholarships, though devoted to the objects of the college, were not devoted to the support of the college.

For the college it was contended that, looked at broadly, the college came within the intention of the Act, since it was largely supported by public and private generosity; that in interpreting the Act regard must be had to the intention of the legislature, and that it should not be departed from through the organic growth of interpretation. It was contended further that a proportion of the total income derived from annual voluntary contributions which would be quite inadequate if the rest were commercial profits should be regarded in an entirely different light in a case where the remainder of the income was derived from sources which had their origin in public or private generosity; that "annual" should be read as meaning received year by year from the point of view of the receiver and not the contributor; that a government grant was a voluntary contribution by the Crown; and that gifts in kind included not only books, music, etc., but also the financial benefits resulting from the favourable terms of the lease and gifts of buildings. It was also contended that legacies should be included; and that gifts for scholarships and prizes supported the college as defined in its charter.

The tribunal was satisfied that certain general principles were to be derived from the decided cases, and proceeded to set those out and apply them to the various funds, etc., claimed by the college as annual voluntary contributions.

It held, first, following the decision of the Lands Tribunal in the *London Library* case, that "annual" in connection with voluntary gifts had to be construed in relation to the contributor and not to the receiver; and that it followed that all the cases in which a lump sum had been donated to form a fund, the interest on which was to be used as a prize or scholarship, must be excluded from the description of "annual voluntary contributions"; that such a gift was essentially a "once-for-all" payment which fell into the same category as a legacy, similarly ruled out by the tribunal in the *London Library* case.

It held, next, that annual contributions which were themselves to be used as received for scholarships or exhibitions to pay the holder's fees to the college were to be regarded as "annual "voluntary contributions"; but it was not satisfied that any such scholarships or so much of any such scholarship as was to be devoted to the maintenance of the pupil fell into the same category, for they went to support the pupil rather than the college; and similarly, a prize which a pupil was free to expend in any manner he might choose, and which did not under the terms of the gift have to be devoted to payment of fees, could not be said to be a contribution by which the college was supported, but was a gift for the encouragement of the pupil rather than for the support of the college.

As to payments by trustees under the terms of a trust deed, the tribunal held that where a trust required a payment to be made to the college, the obligation took the payment out of the class which could be regarded as annual voluntary contributions, since it represented the interest on a once-for-all gift for the benefit of the institution and should be regarded in the same way as other dividends and interest. The tribunal distinguished the cases where the trustees were at liberty to devote the funds at their disposal at their own volition to one or other of named institutions, or to any institution falling within a generally described class, in which cases their contributions could be said to be voluntary.

The tribunal then applied those principles to the specific funds claimed as annual voluntary contributions by the college and in the result found that the only sums which were entitled to be regarded as annual voluntary contributions were items making a total of £1,130. The total income for 1956 being £72,115, the tribunal held that there must be added to it the gross receipts from catering, which in that year amounted to £8,196, so that the proportion of the total income represented by what the tribunal found to be annual voluntary contributions was something under two per cent. The tribunal concluded that, having regard to the proportion which the annual voluntary contributions bore to the gross income, it must, applying the construction of the section adopted by Jenkins J. in *Battersea Borough Council* v. *British Iron and Steel Research Association*,[6] find that that insignificant proportion could not properly be regarded as even partial support for the purposes of the section. The tribunal added that it was not without interest that the amount adopted by the Court of Appeal as annual voluntary contributions in the case of the college in 1898 was in excess of the sum which it found could now be so described, while the total income of the college was more than four times greater than it had been at that time.

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[6] [1949] 1 K.B. 434, 457.

In those circumstances the tribunal answered the preliminary question of law by saying that the college was not exempt under section 1 of the Scientific Societies Act, 1843.

The college appealed, and the valuation officer and the rating authority cross-appealed on the ground that the tribunal had wrongly included certain scholarships as annual voluntary contributions and that all should be disregarded as being directed to the pupil and not the college.

Ronald Bell for the college. The decision in 1898 in *Royal College of Music* v. *Westminster Vestry*[7] that this college is instituted for purposes of the fine arts exclusively is not open to attack in this court, though the respondents have reserved the right to challenge it if the present appeal goes to the House of Lords. The court, in considering whether such a society is supported in part by annual voluntary contributions, will approach the matter broadly and its final judgment will not be based on percentages or arithmetic but on the intention of the legislature in enacting in 1843 a provision for exempting from rates an institution which is so wholly within the spirit and intention of the section and which has since its foundation been supported largely by public and private generosity: *Roppel* v. *Bennett.*[8] The words of the section should be looked at and they should not be interpreted merely by following the decisions in widely differing cases. In particular, the decision in *Battersea Borough Council* v. *British Iron and Steel Research Council*[9] that just over 2 per cent. was too insignificant a proportion of total income to be regarded as even partial support for the purposes of the proviso to section 1, which the tribunal applied in this case, should not be followed, for in that case the court decided that the research council was not a society instituted for the purposes set out in section 1, and that case is therefore distinguishable. There is no reported case in the superior courts in which the benefit of the section has been refused to a body like the Royal College of Music.

The tribunal in the present case, following its own decision in *London Library* v. *Cane*,[10] held that " annual " in connection with voluntary gifts must be construed in relation to the giver and not to the receiver, and that gifts in kind must be excluded; but on the appeal in the *London Library* case,[11] Hodson L.J., giving the judgment of the Court of Appeal, said,[12] albeit obiter, that "annual" should be construed from the receiver's point of view, and that gifts in kind should normally be allowed on the same basis, if they supported the society. Applying that dictum to the present case, there is here a total yearly receipt of money or money's worth coming to the college with sufficient regularity to entitle it to look on it as annual revenue, although the moneys or money's worth come from different donors and different sources. "Voluntary" means simply "without consideration." A gift is a contribution when it is made to the society, whether on trust or not, or, if the capital is given to separate trustees, when each payment of trust income is made to the society. If that is the correct approach, there should be included as annual voluntary contributions (a) all legacies; (b) single once-for-all gifts; (c) donations; (d) gifts in kind; (e) income from trusts under the terms of the trusts even where the donor has no discretion; and (f) government grants. [*Bradford Library Society* v. *Churchwardens of Bradford*[13]; *St. Anne (Churchwardens)* v. *Linnaean Society*[14]; *Savoy Overseers* v. *Art Union of London*[15]; *Institution of Mechanical Engineers* v. *Cane (Valuation Officer)*[16] were referred to.]

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[7] [1898] 1 Q.B. 304; 809, C.A.

[8] [1949] 1 K.B. 115; 64 T.L.R. 452; [1948] 2 All E.R. 627, C.A.

[9] [1949] 1 K.B. 434, 457, C.A.

[10] 51 R. & I.T. 571.

The government grant is a voluntary annual contribution because it is the gift of Her Majesty from an annual grant voted to her by Parliament and is not a grant made by taxpayers without their consent. If such grants were disallowed and yet added to gross income, a body could be deprived of rating exemption and then left impoverished, thus reversing the purpose of the grant. Though in *Battersea Borough Council* v. *British Iron and Steel Research Council*[17] and in *British Launderers' Research Association* v. *Hendon Borough Rating Authority*[18] a contrary view was expressed by this court, it is open to the court in the present case to treat the matter as res integra for, before expressing the view that government grants were not "annual voluntary

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[11] [1960] 1 Q.B. 373; [1959] 3 W.L.R. 929; [1959] 3 All E.R. 726, C.A.

[12] [1960] 1 Q.B. 373, 386.

[13] (1858) 1 E. & E. 88.

[14] (1854) 3 E. & B. 793.

[15] [1896] A.C. 296; 12 T.L.R. 377, H.L.

[16] [1960] 3 W.L.R. 978; [1960] 3 All E.R. 715, H.L.

[17] [1949] 1 K.B. 434, 459.

[18] [1949] 1 K.B. 462, 472; 65 T.L.R. 103; [1949] 1 All E.R. 21, C.A.

"contributions," the court in those cases had held that the research associations were not within the section at all, and the opinions as to the nature of government grants were not necessary to the decisions. Thus they can and should be disregarded. [*Royal College of Music* v. *Westminster Vestry*, *per* Hawkins J.[19]; *Hornsey School of Art* v. *Edmonton Union*[20]; *Westminster City Council* v. *Royal United Service Institution*,[21] and *British Non-Ferrous Metals Research Association* v. *Borough Council of St. Pancras*[22] were referred to.]

Further, "support" of the college means or includes help in carrying out its purposes, and for that reason prizes and scholarships allocated for the benefit of students or for their own use (as well as those for the payment of fees), which were excluded by the tribunal, should be allowed in the total of annual voluntary contributions.

Finally, as to the tribunal's decision that the gross receipts from catering and the London County Council concerts should be added to the total income, thereby reducing the percentage attributable to annual voluntary contributions, the rule as to gross income is for general guidance only and is flexible, and those amounts should be disregarded for the purpose of the present decision.

W. L. Roots Q.C. and *J. Raymond Phillips* for the valuation officer. First, neither capital sums nor the income from them received by the college can be regarded as annual voluntary contributions, for they belong to the college and must be treated as an original endowment of capital and thereafter receipt of interest: see *per* Hawkins J. in *Royal College of Music* v. *Westminster Vestry*.[23]

As to legacies, though they are voluntary, they are not annual. On the assumption that the *London Library* case[24] was rightly decided, the dictum obiter which is relied on for the college might justify deciding that all gifts or legacies of which the capital can be spent are admissible as annual voluntary contributions, but only if there is a regular pattern of them and they are not so large that they should properly be regarded as capital. Few of the items in the table fall into the category of regular flow year by year, and some are too large to be treated as other than capital endowment.

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[19] [1898] 1 Q.B. 304, 311.
[20] (1905) 70 J.P. 121, C.A.
[21] [1938] 2 All E.R. 545.
[22] (1932) 16 R. & I.T. 136.
[23] [1898] 1 Q.B. 304, 311.
[24] [1960] 1 Q.B. 373, 386.

In the same way gifts which may be spread over a number of years do not qualify, for they are really one gift which lacks the "annual" character and the quality of recurrence; and for the same reason once-for-all gifts, though voluntary, should be disallowed. Gifts from trusts where the trustees are obliged to pay the amount under the terms of the trust so that they have no discretion might be regarded as "annual" but they are not "voluntary." It is conceded that trust moneys paid annually at the trustees' absolute discretion may qualify. On the other hand, moneys received for scholarships and prizes which the recipient may use as he chooses constitute support for the pupil but not for the college and should not be included. [*Marylebone Vestry* v. *Zoological Society*[25]; *Russell Institution (Governors)* v. *St. Giles Vestry*[26]; *Jenner Institute* v. *St. George's, Hanover Square*[27]; *Liverpool Corporation* v. *West Derby Union*[28]; *Royal United Services Institution* v. *Westminster City Council*,[29] and *In re University Club*[30] were also referred to.]

The exclusion of the government grant is, it is submitted, concluded by the decisions of this court in *Battersea Borough Council* v. *British Iron and Steel Research Council*[31] and *British Launderers' Research Association* v. *Hendon Borough Rating Authority*[32]; what was there said was a decision, albeit on one point only, and it is binding on this court: see *per* Lord Simonds L.C. in *Jacobs* v. *London County Council*[33] that where the court has arrived at two conclusions, either of which would have sufficed to decide the case, this court is bound by both. Government grants are not bounty from a private source but are annual payments of money compulsorily exacted from the taxpayer.

On the cross-notice, the tribunal wrongly held that grants or scholarships for the payment of fees for tuition were annual voluntary contributions for the support of the college, for though they are used for the objects of the college they do not support it. Fees for tuition are payments passing for a consideration and should not be included in the total of annual voluntary contributions. The decision of the tribunal that prizes and scholarships which the holder is at liberty to use as he likes should be excluded was correct, for they support the pupil and not the college. The college is merely trustee for the amount of interest devoted to that purpose. It is conceded that many things may assist the work of the college, but they do not constitute "support" within the meaning of the proviso to section 1.

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[25] (1854) 3 E. & B. 807.

[26] (1854) 3 E. & B. 416.

[27] (1900) 16 T.L.R. 444.

[28] (1905) 21 T.L.R. 469.

[29] (1938) 28 R. & I.T. 313.

[30] (1887) 18 Q.B.D. 720.

[31] [1949] 1 K.B. 434, 459.

[32] [1949] 1 K.B. 462, 472.

[33] [1950] A.C. 361, 368; 66 T.L.R. (Pt. 1) 659; [1950] 1 All E.R. 737, H.L.

As to the amounts appearing in the college accounts from L.C.C. concerts and catering, these should, following what Somervell L.J. said in *Nonentities Society* v. *Linley*,[34] be taken into account in considering the total gross income of the college and the relation which the annual voluntary contributions bear to that total.

Reginald Bell for the rating authority. The submissions for the valuation officer are adopted. The test of annual voluntary contributions is effected by looking at the revenue account of the institution to see whether there are flowing into it year by year contributions in money or money's worth which come from private sources of generosity and which can be used for the general purposes of the institution. If there are such contributions, and they are not too meagre in quantity, the institution is "supported" in part by annual voluntary contributions. The difficulty here is that this society does not have that kind of contribution coming in at all.

The contributions must support the college. Scholarships and prizes, where payable to a pupil for his maintenance, support not the college but the pupil. The aim is to support a pupil who would otherwise not be able to support himself.

The test of whether a contribution supports the institution is to consider whether if the institution were faced with financial difficulty it could use the contributions to meet the difficulty. In this case the funds in dispute are tied up for particular purposes, such as prizes and scholarships, and the college could not without breach of trust take either the capital or the income to save itself from financial disaster, so that, while those items are undoubtedly for the improvement and assistance of the college, they do not support it in the sense required by the Act of 1843.

Ronald Bell replied.

Cur. adv. vult.

Feb. 14. HOLROYD PEARCE L.J. The Royal College of Music is an educational charity. It was incorporated by Royal Charter in 1883. In 1890 Crown land was let to it at a nominal rent. The original building was erected from funds provided by a private benefactor, and it was afterwards enlarged and improved at the expense of other private benefactors.

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[34] (1954) 47 R. & I.T. 426, 428, C.A.

The college appeals from a decision of the Lands Tribunal which deprives it of the exemption from rates which formerly it had enjoyed under section 1 of the Scientific Societies Act, 1843. That section, so far as is material to this appeal, is as follows: "no person or persons shall be assessed or rated, or liable to be "assessed or rated . . . in respect of any land, houses, or build-"ings . . . belonging to any society instituted for purposes of "science, literature, or the fine arts exclusively, . . . provided "that such society shall be supported wholly or in part by annual "voluntary contributions." The Lands Tribunal held that the college was not so supported wholly or in part.

The right of the college to exemption was challenged in this court in *Royal College of Music* v. *Westminster Vestry*,[1] where the rating authority unsuccessfully argued, inter alia, that the college was not a society instituted for the purposes of the fine arts exclusively. That point, therefore, is not open to the Revenue in this court, but it has been reserved for argument if the case reaches the House of Lords. That decision did not deal with the proviso to the section since no point was then taken on it.

The Lands Tribunal held here that the only sums entitled to be regarded as annual voluntary contributions in 1956 amounted to £1,130. Against this it found that the total income was £80,357. The proportion of the total income, therefore, represented by the annual voluntary contributions was under two per cent. Following the construction of the section adopted by Jenkins J. in *Battersea Borough Council* v. *British Iron and Steel Research Association*,[2] it held that this was an insignificant proportion which could not properly be regarded as even partial support.

Mr. Ronald Bell, for the appellant college, seeks to attack the decision in three main directions. First, he seeks to show that the tribunal underestimated the amount of annual voluntary contributions by wrongly excluding various contributions or classes of contributions which should properly be included. Secondly, he seeks to show that the tribunal has inflated the total income of the college by including an item of £8,196 gross receipts for catering and a sum of £2,000 in respect of concerts conducted on behalf of the London County Council, both of which should for this purpose be disregarded. If either of these contentions is right, the proportion of annual voluntary contributions to total income must pro tanto increase.

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[1] [1898] 1 Q.B. 304, 809; 14 T.L.R. 351, C.A.

[2] [1949] 1 K.B. 434, 457; 65 T.L.R. 183, C.A.

Finally, he argues that in any event the final question is not one of percentage or arithmetic. One must apply the section in the light of the manifest intention of the legislature. The statute, he argues, clearly intended to exempt such a corporation as this which was instituted for the purposes of the fine arts exclusively and owes its origin and its lifeblood to public and private generosity.

There are various sources of benefit to the college which are set out with care and clarity in the decision. As one might imagine, some of those sources involve much detail and many figures. But in order to decide which of such sources can on principle be regarded as annual voluntary contributions, and which must be excluded, it is not necessary to investigate the details.

The tribunal, following a decision of the President of the Lands Tribunal in *London Library* v. *Cane*,[3] held that the word "annual" in connection with voluntary contributions must be construed in relation to the contributor rather than the receiver. The *London Library* case[4] was, however, subsequently taken to this court, which held that one should consider the receiver's point of view when deciding whether contributions were annual. Hodson L.J., giving the judgment of the court, said[4]: "In "our judgment, the receiver must be considered when deciding "whether contributions are annual. . . . it" [a society] "may "look for support, not only to regular annual subscriptions, but "to the proceeds of street collections, and the many other ways "of raising money for charities and similar organisations. It "may well be that legacies of varying amounts are left to the "society from time to time. Clearly, a legacy will come only "once from a particular person, but legacies may come to a "society with sufficient frequency to justify it in looking to them "year by year as probable revenue. We are not, of course, considering legacies of large sums which the tribunal might think "should properly be regarded as capital endowment. Annual "voluntary contributions are, in our judgment, voluntary con-"tributions which the society may reasonably expect to receive

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[3] (1958) 51 R. & I.T. 571, 576.

[4] [1960] 1 Q.B. 373, 386; [1959] 3 W.L.R. 929; [1959] 3 All E.R. 726, C.A.

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"year by year, and upon which it may reasonably rely wholly or "in part for the provision of the necessary annual expenditure "of the society." Those remarks are obiter, but I entirely agree with them (save for the sentence dealing with legacies of large sums, as to which I feel doubt) and I adopt them for the purposes of the present case.

In that case the court used the annual figures of the preceding five years which "showed a reasonably consistent pattern." In the present case we have been provided with prepared schedules of the figures of the years 1951 to 1957. They, too, show a reasonably consistent pattern and enable one to come to a fair conclusion about the various sources of revenue. Although 1956 is the rating year in question, one can better form a true picture of the college's position by studying also a few years immediately preceding it, and the year that follows it. The statute was intending to benefit institutions of a certain class. Over a period of years those exempted by the section might cease to be within it, and those not within it might gain admittance. But it can never have been intended that one lean year in respect of voluntary contributions should cast out an institution which on its recent average accounts was hitherto within it, or that one fortunate and fortuitous year should bring it within an exemption to which in normal years it would have no right.

Applying that dictum of this court in the *London Library* case,[5] it follows that the tribunal was wrong in holding that legacies could not be annual voluntary contributions. It becomes a question of fact whether in the present case legacies which were not earmarked for particular funds or purposes came with sufficient regularity to justify the college in looking to them year by year as possible revenue. In my judgment they did. It is to be noted that the Government in granting annual aid to the college has insisted that these legacies should be treated in the accounts as revenue, and not as capital. The legacies are moderate in size and plainly come from the annual mortality among a wide class of benefactors.

Mr. Roots argues that a bequest producing a payment of £1,500 in 1955 and a further payment of £300 in 1956 was so large as to constitute a capital endowment, and should therefore not be considered among annual voluntary contributions. He relies on the sentence of Hodson L.J. in the passage which I have quoted[6]: "We are not, of course, considering legacies of

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[5] [1960] 1 Q.B. 373.

[6] Ibid. 386.

" large sums which the tribunal might think should properly be " regarded as capital endowment." I feel some doubts about the validity of that sentence without some further qualification. But in my judgment there is in any event no reason for its application in this case.

The year 1956 was a lean year in comparison with those which went before and that which went after. In my judgment one can fairly for this purpose put the annual value of contributions by unconditional legacies in the region of £500.

The further question arose whether legacies with conditions attached, or funds given to trustees whose trust deed compelled them to make annual payments to the college for particular purposes, were annual voluntary contributions either as to the capital sums or as to the interest that came from them. The tribunal held that neither the capital payments nor the annual payments therefrom came within the words " annual voluntary " contributions." It is not an easy question.

In *Bradford Library Society* v. *Churchwardens of Bradford*[7] and in *St. Anne* (*Churchwardens*) v. *Linnaean Society*[8] the court took the view that, when an obligation to pay was incurred by a voluntary engagement, the payment was voluntary within the meaning of the section even if the payer no longer had the power to withdraw from the obligation.

In *Savoy Overseers* v. *Art Union of London*[9] the House of Lords laid down a wider approach to the problem. Lord Halsbury[10] takes the word as meaning not " voluntary " as opposed to " compulsory," but " voluntary " as opposed to something which involves valuable consideration: " It is manifest that if " used in the former sense every purchase is voluntary, since no " one can be compelled to buy; but if in the latter sense, there " are a great many institutions which the legislature may well " have intended to encourage, because if people gave their money " without receiving anything in return towards the encourage- " ment of objects which the legislature approved, there would be " a reason why the legislature should exempt such institutions " from rating, since they would pro tanto relieve the national " funds from burdens to which, but for such voluntary contribu- " tions, the legislature itself might be called upon to contribute " if such institutions were to exist at all. This consideration

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[7] (1858) 1 E. & E. 88, 95.

[8] (1854) 3 E. & B. 793, 804.

[9] [1896] A.C. 296; 12 T.L.R. 377, H.L.

[10] [1896] A.C. 296, 305–306.

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"would seem to show that it is in the latter sense that the word "is used, and, if so, it is fatal to the claim of the art union to "be relieved from the burden in question."

Lord Herschell said [11]: "The expression 'supported by volun-"'tary contributions' has long been well known in connection "with hospitals and other institutions; I think the essential idea "conveyed by them is that the payments are a gratuitous offering "for the benefit of others, and not the price of an advantage "purchased by the contributor." Lord Macnaghten and Lord Shand [12] spoke to the like effect.

In *Institution of Mechanical Engineers* v. *Cane* [13] Lord Radcliffe said: "As I understand the matter, the major effect of "the decision of this House in *Savoy Overseers* v. *Art Union* "*of London* [14] was to put an end to the controversy that had "persisted until then as to whether the emphasis of the word "'voluntary' turned on the distinction between 'voluntary' "and 'compulsory.' It was held that that was not the point. "Accordingly, any considerations that give weight to that dis-"tinction are now illegitimate." Therefore one may approach the problem by equating the word "voluntary" to "gratuitous." And in that sense all the payments with which this case is concerned were voluntary payments.

It is argued by the respondents that if one regards payments by independent trustees of a trust in favour of the college or some scholarship at the college as annual voluntary payments, one must also apply that principle to trusts where the college is the trustee, since it is, qua trustee, in no different position from independent trustees. If that be so, the income from all endowments comes within the section however old the endowments may be. That cannot, in my judgment, have been intended. The section was directing itself to contemporary beneficence. A society was only to be exempted if it commanded contemporary support from some part of the community. Moreover, it would be an abuse of language to say that various old foundations endowed by medieval benefactors are today supported by annual voluntary contributions.

On the other hand it offends one's common sense to hold that although there is an annual flow of money to the college (or to trustees) for the formation of trusts that help the college to perform its functions, they are to be disregarded altogether as contributions simply because the benefit is to accrue from interest in future years and not in the year in which they are received. The Lands Tribunal held that they could not be regarded as annual voluntary contributions either when they are received or in later years when they bear annual fruit.

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[11] [1896] A.C. 296, 310.

[12] Ibid. 312, 314.

[13] [1960] 3 W.L.R. 978, 992–993; [1960] 3 All E.R. 715, H.L.

[14] [1896] A.C. 296.

Neither side has been able to find any case that is directly helpful on this point. Mr. Roots relies on the passage by Hawkins J. in the *Royal College of Music* case,[15] where, in referring to the item which represented the college's income from dividends and interest which was largely made up of income from scholarship trusts and the like, he observed: "It can hardly be "said that the interests and dividends, £4,639, were annual "voluntary contributions, for they were interest and dividends "of moneys or securities already belonging to the society. Such "invested moneys were, however, in part made up of donations "made to the college upon trust for scholarships, exhibitions, "prizes and maintenance of scholars." But I do not think that very much weight can be put on those words which were not intended to be a pronouncement on any matter in dispute.

In my judgment it is wrong to exclude this continuing stream of beneficence as not coming within the words "annual voluntary "contributions." The payments are all voluntary. When the capital comes into the hands of the college it is in that year a voluntary contribution. When the capital remains in the hands of the trustees, and only its fruit comes into the hands of the college, that fruit is a contribution in each year of receipt. I see no reason why one should regard the college qua trustee as a technical separate entity for this purpose. When it receives a sum of money, whether with or without a trust, for its purposes, the college is receiving a voluntary contribution. But as capital contributions are counted when first they are given, the interest on such benefactions cannot again be counted as contributions in subsequent years. Thus past or ancient benefactions, unless in the hands of separate trustees, are disregarded for this purpose. In this case there are no ancient benefactions in the hands of separate trustees, and their existence is always very rare.

It follows that one should include as annual voluntary contributions the annual payments from independent trustees in account B (a) (iii) (2). Whether the capital benefactions listed in account B (a) (iii) (1) can be described as annual is a question of fact. If, looking at them from the college's point of view, one can reasonably say that they are an annual source of benefit, then they come within the words of the proviso. On the figures before us in account B (a) (iii) (1) there is, in my judgment, enough continuity of flow to constitute them "annual" contributions.

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[15] [1898] 1 Q.B. 304, 311.

Moreover, I do not think that in order to hold that these are annual contributions one is compelled to scrutinise them separately as a distinct class. There is in this case a constant annual flow of moneys which comes from various sources, subscriptions, gifts, gifts for scholarships, legacies with conditions, legacies with no conditions. If one of the component tributaries should temporarily run dry, I see no reason on the facts of this case why when it flows again it should be disqualified from counting as part of the uninterrupted stream of other annual voluntary contributions. I would therefore include the capital sums set out in account B (a) (iii) (1) and the income sums in B (a) (iii) (2) in the year of receipt.

The tribunal rightly held that payments, whether for scholarships or otherwise, by trustees who were at liberty to devote their funds each year to one or other of named institutions, or to any institution within a generally described class, were voluntary contributions.

On a cross-notice it was argued that all scholarships must be disregarded, for they are directed to the pupil and not the college. Moreover, it is argued that support means only the provision of that which is strictly necessary to the functioning of a society and does not include benefits which enable it to function better. I cannot assent to that argument. It is admittedly a question of degree. But where, as here, a corporation has purposes of which quality and excellence are the key-notes, it cannot be that only those things constitute support which enable it to drag out a mediocre existence. The provision of that which will enable it to excel must also be within the meaning of support. I share the Lands Tribunal's view on that point, and the point raised in the cross-notice fails.

But the tribunal went on to hold that although scholarships used to pay the holder's fees to the college might be regarded as "contributions," scholarships (or some part of scholarships) devoted to the maintenance of a pupil cannot be so regarded. Moreover, prizes which a pupil is free to spend as he chooses were not, it held, a contribution to the support of the college, but a mere encouragement of the pupil.

With all respect I find myself unable to share that view. One of the essentials to the success of such a college is the provision of prizes and scholarships. A college needs to attract both quantity and quality of human material for its educational purposes. And incentives to the pupils are desirable and even necessary to any teaching establishment. The provisions in the charter "As to pupils" support this view. Nor must one forget the college's duty as laid down in the charter to promote the cultivation of music as an art. The fact that a scholarship provides for the pupil's maintenance which the college is not able to provide is part of its attraction. It is irrelevant that the college does not financially receive immediate benefit from that fact. Such scholarships would be a wise and proper provision out of the college's own funds. Their provision by a benefactor contributes to the support of the college. The argument that the scholarships are for the benefit and support of the pupil does not meet this point. Those who provide scholarships are no doubt moved by beneficence to both pupil and college. But from a practical point of view scholarships are necessary to the college. Their provision is in all but the narrowest sense support of the college not only in its educational duties but also in its duty to promote the cultivation of music as an art. In so far, therefore, as scholarships were excluded from or diminished in the tribunal's calculations by reason of the fact that they provided external maintenance for pupils, such exclusion or diminution was, in my judgment, incorrect.

All gifts in kind were excluded from consideration by the tribunal following the decision of the President of the Lands Tribunal in the *London Library* case.[16] On that point this court expressed a different view. Hodson L.J. said[17]: "We "unable to see why gifts of this kind" (new books) "which help "the library year by year to fulfil its purpose, should not be "regarded as contributions because they are gifts in kind and "not in money. It may be, of course, that a gift might be made "to the library of a rare book of great value. . . . a gift in such "a case might in certain circumstances be regarded rather in "the nature of a capital endowment than a contribution to which "the society might look for its partial support year by year." Though these remarks are obiter, I agree with them and would adopt them in the present case mutatis mutandis.

[16] [1960] 1 Q.B. 373.

[17] Ibid. 387.

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The parties have very conveniently compiled a list of such gifts over seven years and agreed that their fair annual value is £600. These gifts could in a crisis be turned into money. But they are in their own identity useful for the purposes of the college. Some are valuable and rare. But the purposes of the college under its charter are not pedestrian. It aims specifically at the encouragement and promotion of the cultivation of music as an art. To possess valuable instruments, opera costumes, and even a valuable autograph letter of Beethoven is well within its purposes. Therefore the regular annual intake of such gifts clearly helps it in its task. Can that help be described as, in part, supporting the college? In spite of the argument of Mr. Roots I consider that it can. Support of an institution with high aesthetic purposes may extend to the provision of refinements which add value to its efforts and aid achievement of its aspirations.

The most important single contribution which is material is a Government grant of £14,125. When the college's accounts were under discussion in the courts in 1898 it was receiving an annual grant of £500 which was described in the case stated as "annual subscription from Her Majesty out of an annual grant "voluntarily voted to Her Majesty by Parliament" and available by the terms of the vote to Her Majesty for the purpose. This grant was included as a voluntary subscription in a list of items amounting to £1,632. Hawkins J. in the Divisional Court (*The Royal College of Music* v. *Westminster Vestry*[18]) said: "the "sum of £1,632 only was derived from annual subscriptions of "a purely voluntary character," and thereby he inferentially approved of the grant being so described.

Thereafter Government grants were held to be "annual voluntary subscriptions" by Divisional Courts in *Hornsey School of Art* v. *Edmonton Union*[19] (expressly following that dictum of Hawkins J.); in *Westminster City Council* v. *Royal United Service Institution*[20] (following the latter case) and in *British Non-Ferrous Metals Research Association* v. *Borough Council of St. Pancras*.[21]

In one case, *Liverpool Corporation* v. *West Derby Union*,[22] it was held that the particular grant in that case was not a voluntary contribution. But I think it shows no exception to the principle. Ridley J., who was a party to the decision, explained (in the *Hornsey School of Art* case[23]) the particular facts on which it had turned, and the reason for the court's decision. Indeed it was a wholly different kind of case from the present.

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[18] [1898] 1 Q.B. 304, 311.

[19] (1905) 70 J.P. 121, D.C.

[20] [1938] 2 All E.R. 545.

[21] (1932) 16 R. & I.T. 136.

[22] (1905) 21 T.L.R. 469, D.C.

Thus for 50 years the courts held that a Government grant could be and was (with that one exception) in particular cases an annual voluntary subscription. But in *Battersea Borough Council* v. *British Iron and Steel Research Association*[24] there is an expression of opinion to the contrary effect by Jenkins J., with whom Bucknill and Denning L.JJ. agreed. A similar opinion was expressed by Denning L.J. (with which Bucknill L.J. and Jenkins J. agreed) in *British Launderers' Research Association* v. *Hendon Borough Rating Authority*,[25] which was decided immediately after the former case. Both those opinions might be said to be obiter in that the court before dealing with the proviso had already held that the respective societies were not within the section at all.

Jenkins J., having referred to the grant in that case as containing a number of stipulations which were relied on as excluding it from the category of voluntary contributions, said[26]: "But I "think the objection goes deeper. In my view, a grant out of "public funds, . . . at the expense of the general body of tax-"payers, is not a 'voluntary contribution' within the meaning "of the section or within any ordinarily accepted sense of that "expression."

That case was wholly different from the present. There were a number of stipulations to secure that the results of the council's researches were made available as public interest might demand. Here the grant is a gratuitous act of bounty.

Denning L.J., in the *British Launderers'* case,[27] having given the opinion that voluntary contributions are payments made without compulsion and without any view to recompense save the gratitude of one's fellow men said: "They are payments "made by private citizens for the public benefit, and out of a "sense of public duty, thus relieving the state of an expenditure "which otherwise it might have had to bear. They do not "include government grants. No ordinary person would regard "an institution which was supported only by government grants

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[23] 70 J.P. 121.

[24] [1949] 1 K.B. 434, 459.

[25] [1949] 1 K.B. 462, 472; 65 T.L.R. 103; [1949] 1 All E.R. 21, C.A.

[26] [1949] 1 K.B. 434, 459.

[27] [1949] 1 K.B. 462, 472.

"as being supported by voluntary contributions." I do not think that Jenkins J. and Denning L.J. were envisaging such a case as the present. Trade research associations are very different from a body formed for the advancement of music by means of a central teaching and examining body and for generally encouraging the cultivation of music as an art.

Mr. Ronald Bell urges us to disregard those opinions. If the matter were res integra I see great force in his contention that in 1843 the words "voluntary contribution" would be understood as intended to cover an annual subscription given as an act of bounty by Her Majesty, with no conditions and no possible personal benefit, to a Royal Corporation for the promotion of one of the arts. It is true that government grants have increased enormously in scope, they are frequently hedged with conditions, and they are usually the instruments of ulterior motives which the government, for its own proper purposes, intends to achieve. To such grants the section would not apply. Familiarity with them may have changed our views of government grants in general, and they are spoken of in different terms from those in which they were spoken of one hundred years ago. But this grant, which is still technically made in the old form, is in its essence just such a grant as would have been made in 1843. To hold that it cannot be a voluntary contribution would seem to introduce into the section some words of limitation which are not there.

But in my judgment we are bound by the decisions on this point in the two cases which I have cited. The observations were clearly intended to be decisions and not mere dicta. In *Jacobs* v. *London County Council*,[28] Lord Simonds sets out clearly the rule which applies where a court has arrived at two conclusions either of which would have sufficed to decide the case. In the light of his opinion we must accept the deliberate conclusions of the court in the *British Iron and Steel Research*[29] and the *British Launderers' Association* cases[30] and hold that the government grant in this case was not a voluntary contribution.

Mr. Ronald Bell argues that the catering receipts should be omitted from the total income since the catering is a collateral activity of convenience on which the college attempts to balance income and expenditure and avoids all but a trifling loss. The catering receipts are not the college's real income. Had this college (as some do) entrusted the catering to a caterer, no item in respect of it would have figured in the accounts except perhaps for some trifling subsidy or profit. So, too, with the concerts which are almost entirely reimbursed by the London County Council.

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[28] [1950] A.C. 361, 368; 66 T.L.R. (Pt. 1) 659; [1950] 1 All E.R. 737, H.L.

[29] [1949] 1 K.B. 434.

[30] [1949] 1 K.B. 462.

The Court of Appeal, in a very different case, refused to disregard the receipts from the sale of refreshments in estimating the total income of a society whose principal object was the running of a theatre (*Nonentities Society* v. *Linley*[31]). Somervell L.J. made clear that he was not laying down a principal of law and continued[32]: "It may be that one could "cut out, as it were, some collateral item such as profits from "the sale of refreshments, but I am quite clear that one cannot "start cutting them down by setting against them the expenditure necessary to earn them, because by that process one would "ultimately arrive at the net figure; whereas it is clear, from "the decision referred to," [the *British Iron and Steel Research Association* case[33]] "that prima facie one looks at the gross "figure and sees what proportion the voluntary contributions bear "to it."

In this case I do not think one is justified in wholly disregarding the catering receipts, but the fact that they are collateral and approximately self-balancing receipts and expenditure should be borne in mind, and could be a relevant consideration in a doubtful case. The London County Council concerts, however, should in my view be wholly disregarded. If the college undertook a project costing £80,000 a year on indemnity and reimbursement from a local authority, it would be absurd to say that thereby it had doubled its income.

In my view, however, this case does not fall to be decided by percentages. It is true that in approaching the problem the court will no doubt ascertain approximately the total income and the total amount arising from annual voluntary contributions. It may well think it desirable to find the percentage or the proportion that the latter bears to the former. It may use that percentage as the basis of its opinion that the voluntary contributions are too small to justify a finding that a society is "supported in part" by them. This has been the method of approach in cases dealing with trade societies. But it does not of necessity supply the answer to the problem in all cases.

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[31] (1954) 47 R. & I.T. 426, C.A.

[32] Ibid. 428.

[33] [1949] 1 K.B. 434.

The present case stands on a different footing. No case comparable to this has been reported or has been, so far as I know, before the court on this point. The *London Library* case[34] is the most comparable case; but the London Library was not within the section, and it was not a charity. Nor do I read the cases dealing with trade societies or the London Library as importing a gloss into the statute or doing other than suggesting a method of approach proper to the particular cases. In the *London Library* case,[34] Hodson L.J. there said[35] "Mr. Lawrence has submitted that the proviso is satisfied if "the contributions are not so small as to come within the 'de "'minimis' rule, and we think that a reasonable statement "of the principle laid down by Denning L.J. and Jenkins J. "and accepted by Somervell L.J." That, as he there points out, may be a difficult question of fact.

As a result of the various views that I have expressed as to what may properly constitute annual voluntary contributions, the total amount of such contributions is substantially larger than that found by the tribunal. In the result the percentage relation of annual voluntary contributions to total revenue has been substantially increased. I have not calculated the exact percentage, since in my view that is not the deciding factor.

There is, I think, force in the approach of the local valuation court to this matter. It said: "We have referred closely to "each of those cases but find none which is at all comparable. "We are here considering a college which has been given its "buildings and virtually the land upon which to build them. "It has over the years been supported to the extent of some"thing over a quarter of a million pounds in one way or another "and is continuing to receive some support year by year."

"This college, over the years, has received nearly a quarter "of a million pounds in cash in support of its objects; its "annual interest and dividends on that invested capital sum "amounts to nearly £10,000; its buildings were presented to "it and the land upon which the buildings stand is let to it at "£5 per annum. We note that the valuation officer, having "assigned a gross value of £10,000 to that land and buildings, "considers they are annually worth that amount, taking one "year with another."

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[34] [1960] 1 Q.B. 373.

[35] Ibid. 385.

"We consider that we would not be placing a reasonable "construction upon the section if we ignored those important "past and future considerations and decided this appeal purely "on the percentage relationship of the college's annual sub-"scriptions to its total revenue." It concluded: "In the light "of all these considerations we find that this college is supported "in part by annual voluntary contributions."

The college is devoted to the art of music. Its purposes under its charter are the giving of doctorates and degrees of distinction, the promotion of musical instruction, and the encouragement of the cultivation of music as an art. Its land was provided by benefaction, its buildings have risen from benefaction, a large and constant sustenance has come from benefaction. It lies clearly within the spirit and intention of the statute. It also lies clearly within the literal wording of the statute since it is supported in part by annual voluntary contributions. That part is not so small as to be negligible or derisory. It is a genuine and appreciable part of the total support of the college. To hold that the college is not within the statute is to defeat both the spirit and the letter of it.

In my judgment the college is entitled to the exemption and the Temple of Calliope is not a hereditament within the Rating and Valuation Acts.

HARMAN L.J. This appeal is concerned with the Scientific Societies Act, 1843, of which the long title is "An Act to exempt "from . . . Rates, Land and Buildings occupied by Scientific and "Literary Societies." The Act recites that "it is expedient that "societies established exclusively for the purposes of science, "literature, or the fine arts should be exempt from . . . rates in "respect of land and buildings occupied by them for the trans-"action of their business, and for carrying into effect their "purposes." In the enacting part of the statute there is introduced the proviso which alone has concerned us here, "that such "society shall be supported wholly or in part by annual voluntary "contributions."

A number of scientific societies such as the Linnaean Society, the Oxford Botanic Gardens, and the Jenner Institute, have brought themselves within the exemption, and so indeed has the Royal College of Music, with which we are here concerned.[36] Many other bodies have failed to qualify, such as the United

[36] [1898] 1 Q.B. 809.

Services Institution, the Russell Institution, the Zoological Society, and, most recently, the London Library.

The Royal College of Music was founded by a charter granted by Queen Victoria in the year 1883. That document recites that she was moved to do so by a petition presented to her by the Prince of Wales showing "that it is expedient that a Royal "College of Music should be formed on a more permanent and "extended basis than any existing musical institution." Her Majesty then states that "being desirous of promoting the "advancement of the art of music by the establishment of "the said college" she makes a grant creating a corporation, the purposes of which are stated as follows: "The purposes for which "the corporation is founded are, first, the advancement of the art "of music by means of a central teaching and examining body "charged with the duty of providing musical instruction of the "highest class, and of rewarding with academical degrees and "certificates of proficiency and otherwise persons, whether "educated or not at the college, who on examination may prove "themselves worthy of such distinctions and evidence of attainment; and, secondly, the promotion and supervision of such "musical instruction in schools and elsewhere, as may be thought "most conducive to the cultivation and dissemination of the art "of music in the United Kingdom; and, lastly, generally the "encouragement and promotion of the cultivation of music as an "art throughout Our Dominions."

There are further provisions of the charter to which I call attention. "As to the pupils. The pupils shall consist of "scholars, exhibitioners, and students. The scholars and exhibitioners shall be pupils who have obtained scholarships and "exhibitions entitling them wholly or partially to the privileges "of gratuitous education and maintenance, or one of such privileges, or to some description of aid in their education. The "students shall be pupils who have obtained neither scholarships "nor exhibitions.

"A person becoming entitled to a scholarship or exhibition "who declines to accept the emoluments thereof by reason of his "being able to pay for his education or maintenance, may bear "the title of honorary scholar or honorary exhibitioner, or such "other title as may be determined by the Council. The Council "may cause medals, prizes, or other like rewards to be conferred "on deserving pupils. . . . As to the donors. Annual subscribers "to the funds of the college of £10 or upwards during the period

" of their subscriptions, and contributors at one time of £50 or " upwards, or its equivalent, shall be deemed to be donors within " the meaning of this Our Charter."

Then a further passage: " The Council may establish scholar-" ships, exhibitions and fellowships. They may make terms with " any donors as to the appropriation of their donations for a " building fund, or the endowment of fellowships, scholarships, or " exhibitions, or otherwise as they may think expedient."

And in the regulations I find this: " While the finance com-" mittee recognise the propriety of excluding from capital or " permanent investment account annual subscriptions and other " moneys intended for the current maintenance of the college, " they are of opinion that no scholarship should depend on any " such temporary sources of revenue."

This, then, is clearly an educational charity. The land on which the buildings stand was the gift of the Commissioners of the Exhibition of 1851. The buildings which rose on that site owe their existence to beneficence. The college has ever since its foundation been actively carrying out its objects, and at any rate since the case in 1898 it has never been suggested that it is chargeable to rates until the present proposal.

The college provides a regular academic course for students of music. The teaching is provided free to scholars and partly free to exhibitioners. Fees are charged to ordinary students and amounted in the last year of which we have a record to £37,000, but this sum falls far short of the expenditures, which are between £70,000 and £80,000 a year. Against this is a government grant of about £14,000. Something over £9,000 is drawn from fees paid to the examining board for examination of outside students in conjunction with the Royal Academy of Music in Marylebone Road. For the rest the college depends on private munificence present and past, and it would seem on the face of it to be a shining example of an institution devoted to the furtherance of the fine arts—" All arts constantly aspire to the condition of " music "—and supported in part by voluntary contributions, and so to be clearly within the policy of Parliament in passing the Act of 1843 which is still maintained on the statute book. It is said, however, that the contributions are neither voluntary nor annual, and that, therefore, the college is excluded by the proviso.

I turn, therefore, to an examination of these three words and ask what are annual voluntary contributions. (a) Annual. Gifts qualify if from the point of view of the donee their recurrence year by year can be reasonably relied on, even though the donor be in every case different. In other words, whether a gift is annual does not depend upon whether one donor only makes the gift, but whether the donee annually receives such a regular flow of gifts as enables him to rely on them as a source of income. That was the opinion of this court in the *London Library* case,[37] with which I agree.

(b) Voluntary. A contribution is voluntary if it be gratuitous. This is clearly the law as laid down by Lord Halsbury in the *Art Union* case,[38] and confirmed recently by Lord Radcliffe in the *Institution of Mechanical Engineers* case.[39] It is, therefore, idle to argue on this topic that a gift is not voluntary because it issues from a trust where the trustees are not free agents. "Voluntary" here is not the antithesis of "compulsory," but is apt to exclude annual subscriptions even though made without compulsion, such as those to the Zoo or a professional society, or the Art Union [40] in Lord Halsbury's case, where the subscriber expects a return for his money, not indeed in cash but in prestige perhaps, or some other more material form.

(c) Contributions. This comprises all gifts satisfying the first two conditions. Contributions are to be credited when the money or money's worth reaches the hands of the corporation or the hands of trustees for it.

Which of the sources of the corporation's income satisfy the above conditions? In my judgment on the facts and figures before us the following do: (1) Subscriptions whether paid yearly or in one sum so as to make the payer a donor within the terms of the charter. (2) Gifts in kind which can be converted into money and of which the corporation might dispose if it chose to do so. The value of these in recent years has been agreed between the parties at £600. I rely in this connection on the *London Library* case.[41] (3) Gifts of or covenants to subscribe money for the general purposes of the society, as and when received. (4) Testamentary benefactions for the like general purposes, no conditions being attached. These should be credited in the year of receipt. (5) Testamentary or other benefactions for specific purposes, conditions being attached whether indicating a particular object such as a prize or being earmarked as an endowment to provide out of income for general or specific purposes such as scholarships or the purchase of equipment or the like. In contributions in this category the capital sum should be counted to the college's credit in the year when received either by the college or trustees for it. (6) Grants by trustees of outside funds having discretionary powers, such as grants here made by the trustees of the will of the late Lord Leverhulme. Sums in this category should be credited when received by the college.

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[37] [1960] 1 Q.B. 373.
[38] [1896] A.C. 305.
[39] [1960] 3 W.L.R. 978, 992.
[40] [1896] A.C. 305.
[41] [1960] 1 Q.B. 373.

Under what conditions does a benefaction rank as being "in "support of" the corporation? One, I think, that enriches the corporation itself or relieves it of a burden or furthers its objects or powers. Having regard to the portions of the charter which I have read, it is clear that it is part of the college's business to establish scholarships, and to make terms with donors for their endowment. It is clear, too, that the college may reward deserving pupils as it chooses. In my opinion, therefore, not only a scholarship which pays or partly pays a student's fees, but one which or part of which is payable to him year by year to maintain himself while under tuition supports the college. There is, for instance, a scholarship known as the Octavia Scholarship which is a subvention to a scholar taking a course of musical instruction abroad. In my judgment this is clearly money spent in support of the college, for this is a kind of scholarship which the college itself could endow.

Logically there is much to be said for counting the income of endowment funds as received or applied year by year, for the very object of the donors of such funds was precisely to provide an annual income, but this would involve treating the income of all endowments in this way however far back their source, and the desire to contribute having arisen when the gift was made it seems to me right to treat a contribution as made in the year when it first became effective as a source of income. According to the tribunal, the college cannot be credited either with the capital or the income. This I reject; but I think the college cannot count both, and I prefer the view that the original gift and not its subsequent income should rank as a contribution.

I regard as altogether too narrow the tribunal's view that only gifts that go direct to the college in aid of fees should rank. In my judgment, scholarship moneys should rank, although a part, as in the Leverhulme case, or indeed the whole, is paid to the scholar for his own purposes.

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As to the government grant, I desire to add nothing to what my Lord has said. I confess that if the matter were res integra I should hold this to be an annual voluntary contribution as it was held to be by Hawkins J. in the 1898 proceedings[42]; but I agree that the decisions of the Court of Appeal on this subject in the *British Iron and Steel Research* case[43] and the *British Launderers' Association* case[44] cannot be classed as obiter notwithstanding the fact that there were other reasons on which the decisions rested. In my view, therefore, we are bound in this respect. For my part I much prefer the approach of the local valuation court to this matter to the cheeseparing and niggardly view of the Crown which was accepted by the Lands Tribunal.

Even if this is a matter of adding up percentages, the proportion contributed to this corporation by annual voluntary contributions, if I have rightly construed those words and applied them to the facts of the case, is far above the point where they can be disregarded as so minimal or unsubstantial as to be treated as nothing when considering the words "in part." For these reasons as well as for those given by my Lord, with which I altogether concur, I would allow this appeal.

Davies L.J. I agree that this appeal should be allowed.

Appeal allowed with costs against both respondents.
Cross-appeal dismissed.
Declaration that the Royal College of Music be entered in the valuation list as exempt.
Leave to appeal to House of Lords.

Solicitors: *Boodle, Hatfield & Co.; Solicitor, Inland Revenue; Allen & Son.*

M. M. H.

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[42] [1898] 1 Q.B. 304.
[43] [1949] 1 K.B. 434.
[44] [1949] 1 K.B. 462.

T. K. WORGAN & SON LTD. *v.* GLOUCESTERSHIRE COUNTY COUNCIL.

[Plaint No. P. 2136.]

H. LANCASTER & CO. LTD. *v.* SAME.

[Plaint No. P. 2137.]

C. A.

1961
Feb. 28;
March 1, 2.

Lord Evershed M.R., Upjohn and Pearson L.JJ.

Road Traffic — Licence — Goods vehicle — Haulage — Traction vehicle drawing trailer loaded with felled timber—" Constructed and used ". . . for haulage solely "—Vehicles (Excise) Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 89), *ss.* 4 (2) (*f*), 5 (1) (2), 27.

The plaintiff sought a declaration that tractor vehicles used for hauling trailers loaded with felled timber on the public roads were chargeable to excise duty under section 4 (2) (*f*) of the Vehicles (Excise) Act, 1949, as haulage vehicles and not under section 5 (2) as goods vehicles drawing trailers:—

Held, (1) that if a vehicle was fairly and squarely within the scope of section 4 (2) (*f*) because it was being used as constructed for haulage solely then it was outside the scope of the expression "goods vehicle used for drawing a trailer" in section 5 (2), and the phrase "conveyance of goods" in section 27 did not extend to operations which were purely haulage.

James v. *Davies* [1953] 1 Q.B. 8; [1952] 2 T.L.R. 662; [1952] 2 All E.R. 758, D.C. distinguished.

(2) That, dragging the timber to the trailer, trimming where necessary, and loading, were merely essential ancillaries to haulage, and the vehicles in question were within section 4 (2) (*f*).

Appeal from Judge Ifor Lloyd sitting at Gloucester County Court.

T. K. Worgan & Son Ltd. were timber hauliers, and H. Lancaster & Co. Ltd. timber merchants and sawmillers in Gloucestershire. They brought proceedings against the Gloucestershire County Council claiming in both cases that the defendants had wrongfully refused to issue licences to them under the Vehicles (Excise) Act, 1949, in respect of tractor vehicles known as Matadors, unless they paid duty in accordance with the rate imposed for a " goods vehicle drawing a trailer " by section 5 (2).[1]

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[1] Vehicles (Excise) Act, 1949, s. 4: "(1) The duty chargeable in respect "of a mechanically propelled vehicle "to which this section applies . . . "shall . . . be at the rate specified in "relation to a vehicle of that description . . . [in the Third Schedule]. "(2) This section applies to the "following mechanically propelled "vehicles, that is to say— . . .

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The plaintiffs submitted that the vehicles were chargeable for the lower rate of duty under section 4 (2) (*f*) as tractors. In both cases they asked for a declaration and repayment of the excess duty (£143 for two vehicles in the first case, and £253 for three in the second). The vehicles, all of a similar kind, had been acquired from the War Department and each was fitted with a built-in winch. The plaintiffs had subsequently fitted a jib fixed at the base to a framework of angle-iron bolted to the chassis, and they had removed the floor boards. The county court judge found that the vehicles were not constructed or adapted for use for the conveyance of goods, and anything placed on the floor would have fallen past the gearing to the ground. Evidence was given on behalf of both plaintiffs, however, that loose equipment, articles necessary for loading timber or for trimming it preparatory to loading, such as chains, blocks, handsaws, mechanical saws and axes, and sometimes the notice boards used to warn the passing traffic were carried. The vehicles were used to haul the felled timber which was loaded on to trailers attached behind. The nature of the vehicles' functions is described in greater detail in the judgment of Lord Evershed M.R. The county court judge decided in favour of the plaintiffs and made the declaration asked for. The county council appealed.

J. E. M. Irvine for the county council. The first question is whether these matadors are traction vehicles capable of carrying the driver, petrol and equipment needed for propulsion but nothing else, or are vehicles constructed and capable of carrying goods and used to draw another vehicle. In the latter case they are "goods vehicles." "Haulage solely" must be construed in the narrow sense of "drawing along" and would not cover preliminaries to haulage. Therefore, if, in addition to hauling a

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"(*f*) vehicles . . . [the omitted words "were amended by section 13 (2) of "the Finance Act, 1950: they do "not affect the issue] which are constructed and used on public roads "for haulage solely and not for "the purpose of carrying or having "superimposed upon them any load "except such as is necessary for their "propulsion or equipment."

S. 5: "(1) Subject to the provisions of this Act, the duty chargeable in respect of a goods vehicle of "a description specified . . . in Part I "of the Fourth Schedule . . . shall "... be at the rate specified . . . [in "that Schedule by reference to the "unladen weight]. (2) Subject to "the provisions of this Act, if a goods "vehicle is used for drawing a trailer "there shall be chargeable in respect "thereof [duty additional to that "charged under subsection (1)]."

S. 27: "'goods vehicle' means "a mechanically propelled vehicle . . . "constructed or adapted for use and "used for the conveyance of goods or "burden of any description, whether "in the course of trade or otherwise."

trailer, a vehicle has on it the means used for loading the timber on to the trailer, it is not used for "haulage solely" within section 4 (2) (*f*). The relevant user which has to be considered is on the public roads, but it has been conceded that these vehicles may have to be loaded on the public roads in some cases. Even a cable would, it is submitted, be outside sub-paragraph (*f*) because dragging is not haulage.

These vehicles were constructed, first, to drag the winch and anchor, second, to lift and load, and third, to haul. They were used to perform these three functions and, once laden with goods, they are "goods vehicles" within section 5. The jib and the impedimenta superimposed on them are a load which is not needed for propulsion, nor are they an integral part of a haulage vehicle or necessary to help the vehicle to hold the road, such as a load of ballast. Even a built-in part of the vehicle may be part of the load. The load is related to the first and second uses above rather than to the third. If the timber was loaded on to the matador itself, the matador would plainly be a goods vehicle: *London County Council* v. *Hay's Wharf Cartage Co. Ltd.*[2] It makes no difference if the goods are loaded on to a trailed vehicle instead: *Carrimore Six-Wheelers Ltd.* v. *Arnold.*[3] The narrow interpretation of "load" suggested by the county court judge as understood in the timber trade is not applicable because this section has general application. It is submitted that "carrying" and "conveyance" are interchangeable terms: *James* v. *Davies.*[4]

[UPJOHN L.J. There is a finding by the county court judge that the vehicles were not adapted for carrying goods.]

[LORD EVERSHED M.R. In *James* v. *Davies*[4] it was not suggested that a Land Rover was within section 4.]

Reg. v. *Berkshire County Council, Ex parte Berkshire Lime Co.* (*Childrey*) *Ltd.*[5] shows that there is not a complete dichotomy between the two sections. If a vehicle can be taxed under either section 4 or 5, the practice has been to tax it at the higher of the two rates.

[UPJOHN L.J. But the Crown cannot make concessions. The duty is to tax under both.]

A vehicle which comes under section 4 (2) (*f*) is incapable by construction of carrying goods or burdens. If it is constructed so as to be capable of carrying goods, then section 5 applies and it falls to be taxed under that section, even if it is also under section 4. These vehicles are not so constructed as to be incapable of carrying loads and are not within section 4 (2) (*f*). *Taylor* v. *Thompson*[6] indicates that only slight grounds are needed to turn a vehicle into a "goods vehicle." [Reference was made to *Pearson* v. *Boyes*.[7]] Alternatively, it is submitted that "burden" is distinguishable from "load." The only exception is a burden for propulsion. A "burden" is something borne and is additional to essential equipment: for example, a saw used to trim the wood and loose tackle are goods, but the jib, winch and anchor are a "burden." In *Burmingham* v. *Lindsell*[8] fixed recording apparatus in the back of a vehicle was held to be a burden. That was analogous to the jib in these vehicles. The jib is capable of being used, by reason of its construction, for jobs other than actually hauling.

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[2] [1953] 1 W.L.R. 677; [1953] 2 All E.R. 34.

[3] [1949] W.N. 349; 65 T.L.R. 506; [1949] 2 All E.R. 416, D.C.

[4] [1953] 1 Q.B. 8, 11; [1952] 2 T.L.R. 662; [1952] 2 All E.R. 758, D.C.

[5] [1953] 1 W.L.R. 1146; [1953] 2 All E.R. 779, D.C.

F. Blennerhassett for the plaintiff companies. It is unreal to say that a vehicle constructed for haulage solely becomes a vehicle carrying goods when the vehicle which it is towing is carrying goods. If necessary, it would be submitted that *James* v. *Davies*[9] was wrongly decided. This type of vehicle was obviously not constructed for the carriage of goods; the bottom platform would never have been left off if it had been so intended. Section 4 is dealing with vehicles which, unlike the Land Rover in *James* v. *Davies*,[9] do not themselves carry goods. Section 5 deals with vehicles which carry goods on themselves. Not until one finds a vehicle which is itself constructed for carrying goods does one have to consider section 5. Then it does not matter whether there is an engine or not. To come within section 5 the vehicle must be suitable to have goods superimposed on it. If not, then it comes within section 4 and not section 5. Section 5 deals with a large number of goods vehicles. Section 4 deals with specific categories and, therefore, a vehicle within section 4 is necessarily excluded from section 5. These vehicles are constructed and used for haulage only. In *Reg.* v. *Berkshire County Council, Ex parte Berkshire Lime Co.* (*Childrey*) *Ltd.*[10] the vehicle was clearly carrying a commodity.

[Counsel was stopped on other points.]

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[6] [1956] 1 W.L.R. 167; [1956] 1 All E.R. 352, D.C.

[7] [1953] 1 W.L.R. 384; [1953] 1 All E.R. 492, D.C.

[8] [1936] 2 All E.R. 159, D.C.

[9] [1953] 1 Q.B. 8.

[10] [1953] 1 W.L.R. 1146.

Lord Evershed M.R. The question raised by this appeal falls indeed within a small compass and at first sight might be said not to appear very difficult. It relates to the proper rates of taxation for certain vehicles used by the two respondents to the two appeals in their respective businesses of sawmillers in Gloucestershire. It appears that they were formerly military vehicles and were acquired by the two respondents for their business purposes. The judge in a careful judgment has stated what in fact the functions of these vehicles were and I cannot do better than refer to what he there says: " In view of a submission by counsel for " the defendants "—that is, the county council—" that the " tractors in these cases are not used for haulage solely but also " for the operations of dragging timber along the ground and " lifting it and loading it on to the trailer, it is perhaps desirable " that I should briefly describe the loading operation, although " Mr. Gardner in his evidence took the view, not very sur- " prisingly, that the process of loading is an essential preliminary " and an integral part, of the process of haulage. What happens " in practice is that sometimes tree trunks lying some little way " from the tractor or its trailer, are dragged along the ground to " where the trailer is standing by means of a wire rope worked " from the winch on the tractor, and passing below the base of " the jib. The winch itself is connected through to the motor " power of the tractor. In the process of lifting tree trunks or " branches on to the trailer, the jib is used, the wire rope passing " from the winch over the pulley at the top of the jib, and being " placed round the timber, lifting it from the ground, and finally " lowering it on to the trailer." I add to that description that the vehicles, or some of them at any rate, are also fitted with what have been described as anchors so that during the dragging operations the vehicles will remain stable. Apart, however, from those preliminary operations described in the passage I have read, it has not been disputed by Mr. Irvine for the county council that for the rest what these vehicles do, and particularly what they do upon public roads, is that they haul the felled timber, such felled timber being loaded on the trailers attached to the tractors.

I turn at this stage to make some references to the Vehicles (Excise) Act, 1949. The Act has in certain respects been amended, and though we have noted the amendments, they do not affect the questions now before us. Section 4 (2) provides: " This section applies to the following mechanically propelled " vehicles, that is to say— . . . (*f*) vehicles (other than "vehicles" there referred to, and there has been a slight amendment to the original parenthesis, not affecting the present case) "which are constructed and used on public roads for haulage "solely and not for the purpose of carrying or having super-"imposed upon them any load except such as is necessary for their "propulsion or equipment." If the vehicle is within that category, then, as provided by subsection (1), the duty chargeable in respect of it is to be ascertained by reference to the Third Schedule of the Act. Section 5 in its first and second subsections provides, first, for the duty chargeable in respect of "goods "vehicles" as specified in another of the schedules, and, secondly: "Subject to the provisions of this Act, if a goods "vehicle is used for drawing a trailer there shall be chargeable in "respect thereof" the rather higher duty earlier indicated.

Reverting to the subject-matter of this appeal, we are here undoubtedly concerned with a vehicle drawing a trailer, and the real question in the end I think comes down to this: are these tractors vehicles constructed and used for haulage solely within paragraph (*f*) of section 4 (2); or are they "goods vehicles" drawing trailers as defined in subsection (2) of section 5? One step which must be taken in answering that problem is to see what is meant by "goods vehicles" according to the definition section, section 27 (1): [His Lordship read the subsection and continued:] I have emphasised in reading that definition the words "for the "conveyance of goods," and it will be borne in mind that the relevant paragraph in section 4 speaks of "carrying" a load. Mr. Irvine, in a most ingenious and gallant argument, if he will allow me to say so, has argued first of all that the problem is a matter of fact. He says that, as the judge held and as is admittedly true, the operations with which those vehicles are concerned cannot be properly described as operations of "haulage solely," and that is a reference to the operations which I have described in my reading of the judgment. The operations of dragging the felled timber to the trailer and sometimes trimming the trees, and thereafter placing them or stacking them in the trailer are operations which, says Mr. Irvine, are not strictly speaking haulage, and which involve (and this portion of his argument is important) the presence on these vehicles of the winches, the jibs and the anchors. Mr. Irvine in summarising his argument has contended that these vehicles are not fairly within the description I have read from paragraph (*f*) of subsection (2) of section 4 of the Act, and are not within that definition or description for two reasons which are complementary the one to the other: first, as I have already indicated, because they are neither constructed nor used for haulage solely, and, second, because they carry or have superimposed upon them a load other than such as is necessary for their propulsion or equipment, that is, for their equipment within the meaning of the paragraph, videlicet, equipment for haulage purposes only. And so Mr. Irvine has said that the presence on these vehicles of the winch, the jib and the anchor constitute a load outside the scope of paragraph (*f*) in section 4 (2), or, alternatively, when we come to look at the later sections 5 and 27, goods or possibly a burden which, not being within the strict limitation of paragraph (*f*) of section 4 (2), bring the case within section 5.

Mr. Irvine referred us to a number of cases which have come before the Divisional Court and also a case which came before Gorman J. I shall not, I hope, be thought disrespectful of Mr. Irvine's argument if I do not narrate all those cases and do not attempt to make glosses upon what they decided: but I think I must make a brief reference to two. The first is *James* v. *Davies*,[1] in which a Land Rover, a vehicle which, having named it, I hope is sufficiently familiar nowadays to everyone, and is by its construction made and adapted for carrying goods, was found to be drawing a trailer. No goods at all were loaded in the Land Rover itself, but goods were loaded in the trailer. It was contended by the proprietor of the Land Rover that the vehicle did not fall within section 5 of the Act because it was not a goods vehicle within the meaning of the definition section. That argument was rejected. Lord Goddard C.J. said[2]: "if "the view which commended itself to the justices," namely, that it was not a goods vehicle within the definition, "were "right it would follow that furniture removers could move fur-"niture in great pantechnicon trailers, and if they drew such "trailers by a vehicle which, though constructed to carry goods, "had no furniture in it, it could be said that they were not "liable to pay the heavier rate of duty for goods vehicles. I "think that once a mechanically propelled vehicle is conveying "goods, although it conveys them by means of a trailer, the "question becomes easy. The Land Rover was adapted for "that use and was being used for the conveying of goods or "burden because it was moving potato trays from one place to "another."

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[1] [1953] 1 Q.B. 8; [1952] 2 T.L.R. 662; [1952] 2 All E.R. 758, D.C.

[2] [1953] 1 Q.B. 8, 12.

The second case was *Reg.* v. *Berkshire County Council, Ex parte Berkshire Lime Co. (Childrey) Ltd.*[3] That case related to an agricultural engine which was at the relevant time being used for the purpose of conveying lime from one place to another, the party concerned being, I gather, as a business matter, a dealer in lime. The vehicles were lime-spreading vehicles. The question arose whether the vehicles fell within section 4 or section 5 or possibly both. The court consisted of Lord Goddard C.J., Parker and Donovan JJ. I should state that the paragraph of section 4 (2) to which the *Berkshire* case [3] related was paragraph (*a*), not of course paragraph (*f*) with which we are concerned, the relevant language of paragraph (*a*) being "agricultural tractors and other agricultural engines, which are "not used on public roads for hauling any objects except . . . (i) for "hauling their own necessary gear, threshing appliances, farming "implements . . . or supplies of water or fuel required for the "purposes of the vehicle or for agricultural purposes; (ii) for "hauling from one part of a farm in the occupation of the person "in whose name the vehicle is registered under this Act to "another part of that farm, agricultural produce," etc.

Lord Goddard C.J. drew attention to the broad purpose exemplified by the first section of this Act, namely, to make a distinction between classes of vehicles for tax purposes, first, vehicles used on public roads and then other kinds of vehicles, and as regards the former a heavier rate of tax is payable unless the vehicle comes within one or other of what Lord Goddard C.J. called the exemptions. "Once," said Lord Goddard C.J.[4] "it "comes on a road it becomes liable to tax unless it can be "brought within an exemption. Section 4 (2) is dealing with "mechanically propelled agricultural vehicles which may from "time to time come on to the public roads. They will remain "taxable at the lower rate so long as they only are used on the "roads for the purpose of hauling, but if they are on the roads, "and are used for carrying goods, I can find no ground for saying "that they are not taxable as goods-carrying vehicles. They "must not be used on public roads for hauling any objects except "those set out specifically in [section 4 (2)], and this subsection "so far as it relates to agricultural vehicles is dealing with "haulage and nothing but haulage. The Act clearly distinguishes "between haulage and carriage." Parker J. agreed with that judgment. Donovan J. also came to the same conclusion, but in the course of his judgment he expressed the view that one might have in respect of these sections an overlapping and he gave some reasons for thinking the sections might have to be construed so that one would get from time to time vehicles which might fall both within section 4 and section 5. So far as the vehicles before him were concerned, he was satisfied that they were, at any rate, within section 5.

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[3] [1953] 1 W.L.R. 1146; [1953] 2 All E.R. 779, D.C.

[4] [1953] 1 W.L.R. 1146, 1148.

I have referred to those two cases because one of the problems of difficulty which the present case and these other cases have presented turns upon the language of the definition of "goods "vehicle" in section 27, and, in particular, upon the words which I emphasised in reading—"used for the conveyance of goods." And the difficulty is of this nature. If one takes the decisions which I have mentioned as examples, and in particular *James* v. *Davies*,[5] the Divisional Court there said that a vehicle is no less conveying goods or used for the conveyance of goods because it does so, as it were, at one remove, because it does so not by having them loaded on its own back but by having them loaded upon a trailer which it is itself drawing, being itself unloaded. And so one is faced with the difficulty that if that is right, then how does one make a sensible distinction between a conveyance of goods such as was exemplified in *James* v. *Davies*[5] and a conveyance of goods by a vehicle, such as those with which we are concerned, dragging a trailer on which is loaded felled timber?

I do not find it necessary to attempt any exposition of all the interactions of the various sections of this complicated piece of legislation, and certainly nothing that I am saying should be taken as casting any doubt on the correctness of the Divisional Court's decisions to which I have alluded, decisions which I should have thought, if I may respectfully say so, were plainly in accordance with the common sense and justice of the cases which came before the court. But for my part I think also this, that whether or not Donovan J. was right in saying that there may be possible overlapping, I think that to the formula "used for the conveyance of "goods" there should, at any rate, be understood this limitation: that if one has a vehicle which is plainly within the four corners of paragraph (*f*) of section 4 (2), that is, a vehicle constructed and used not itself for carrying goods but for haulage solely, then that vehicle is outside the scope and intended scope of the formula "goods vehicle." In other words, however wide the natural

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[5] [1953] 1 Q.B. 8.

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sense of "conveyance of goods" may be, it does, by necessary interaction of the various sections, stop short of covering an operation which is properly within the words of paragraph (*f*), namely, "haulage solely." That view I think involves no inconsistency with *James* v. *Davies* [6] having regard to the facts of that case. I recall that there the court was dealing with a Land Rover, a vehicle constructed for the carriage of goods itself, and the court was saying that it was no less performing the functions for which it had been constructed when the goods it was conveying were being conveyed, as I ventured to put it earlier, at one remove. As I said earlier, the day and age in which we live is one of complexity and there are undoubtedly problems which these sections present by way of construction which are not entirely easy. It is tempting to ask (but not tempting to answer when it is not necessary to do so): why, for example, has subsection (3) of section 4 expressly excluded from section 5 vehicles to which one only of the paragraphs of the preceding section applied? Similarly, when one gets to section 5, why does only subsection (3) contain the proviso excluding from that section vehicles which were chargeable with duty under another section? But the subject-matter is a difficult one and in the age of the internal-combustion engine the ingenuity no doubt of manufacturers of vehicles presents a problem for those who are concerned with drafting the statutes imposing duties upon those vehicles.

It is, however, proper to apply, as far as one can, common sense to the construction of these provisions, and I would start, at any rate, with the view that something which is quite clearly brought within one section to which one rate of duty is applicable ought not easily to be said to attract some other rate of duty because one might by some construction of the language bring it also into another section. I do not want to involve myself further with possible overlapping. I found my judgment upon this, that if a vehicle is brought fairly and squarely within paragraph (*f*) of subsection (2) of section 4, that is, because it is being used as it was constructed, for haulage solely, then it is outside the scope of the definition of "goods vehicle" and the phrase in the definition "conveyance of goods" does not extend to purely haulage operations. I add that the problem of the interaction of section 4 and section 5 was not before the court in *James* v. *Davies* [7] and Lord Goddard C.J. had not in that case to consider the matter which is now before us. The interaction of the two sections was, however, before the court in the second case to which I have referred, the *Berkshire County Council* case [8] and the passage which I have quoted from Lord Goddard C.J.'s judgment there included the phrase "The Act clearly distinguishes "between haulage and carriage."

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[6] [1953] 1 Q.B. 8.

[7] Ibid.

Having got so far, it then must, I think, follow that the sole remaining question is whether on the facts as I have stated them it is correct to say, as the judge held, that this vehicle is fairly and squarely within section 4 (2) (*f*). I agree with the judge in thinking that that question must be affirmatively answered.

I follow Mr. Irvine's point that in so far as these vehicles are constructed to enable work to be done other than hauling pure and simple, namely, to enable to be done the operations essentially preliminary to the hauling, they might be said to go beyond paragraph (*f*). But I think so to hold would be to make an unnecessarily fine distinction between one kind of vehicle and another, the main and real purpose of which is haulage and haulage properly so called. To disqualify the vehicle from the scope of paragraph (*f*) merely because its construction enables the essential preliminaries to be performed, namely, dragging the timber up to the trailer, trimming it where necessary and by the jib putting it on, I would find irrational. I think the whole operation is in substance and in truth haulage and that these added operations are merely essential ancillaries. One may no doubt reach a point where one would say that the other operations which the tractors are designed to perform have got too far removed from haulage; but I do not think in this case that that stage has been reached.

Taking that view (and it is, after all, a matter in the end which is only capable of very short exposition) I would hold that these vehicles do fall fairly and squarely within paragraph (*f*). I am not forgetting other points Mr. Irvine indicated—his reference to the use of the word "burden" in the definition section, section 27—but I have not found that those other points further assist. The real question, once the interaction of the two sections is determined, is that which I have last stated and attempted to answer: having regard to the operations which these vehicles are designed to perform or to enable to be performed, are they or are they not vehicles "constructed and used on public roads for "haulage solely," etc.? I think that they are, and taking that view, being the view expounded by the county court judge, I would dismiss this appeal.

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[8] [1953] 1 W.L.R. 1146.

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Upjohn L.J. I agree. The first question to be answered is whether the vehicles in question fall within section 4 (2) (*f*). It seems to me that the haulage vehicles referred to in that subsection are in contrast to the goods vehicles referred to in section 5. As a matter of commercial common sense, a haulage vehicle must have the necessary mechanism to drag the load from wherever it is situate to the trailer, to load it and arrange it on the trailer and to unload it at the other end, and it is quite clear from the terms of the county court judge's judgment that all the equipment, fixed and movable, on these vehicles was necessary for that purpose. Apart from such equipment they had no floor boards and were incapable of carrying goods.

The argument to the contrary, which was put very attractively by Mr. Irvine, involves the proposition that to obtain the benefit of taxation by falling within paragraph (*f*), the vehicle can only haul a fully loaded trailer, and having towed it to the other end, it cannot unload it. That seems to me to be extravagant. It seems to me, therefore, that these vehicles plainly fall fairly and squarely within the sub-paragraph.

The other question to be answered is whether these vehicles are "goods vehicles" within section 27. My answer to that is that these vehicles are not, because they are not constructed or adapted for use or used for the conveyance of goods; they are constructed and used for the haulage of goods, and that is the fundamental distinction between sections 4 and 5. *James* v. *Davies*[9] and *Pearson* v. *Boyes*[10] were both dealing with vehicles constructed themselves to carry goods. Those cases show that where a vehicle is constructed itself to carry goods, the vehicle does not escape liability for the higher rate of duty under section 5 by hauling the goods rather than carrying them itself, but they do not in my judgment bear upon the problem that we have to decide.

For those reasons and for the reasons given by my Lord and by the county court judge, I agree that this appeal should be dismissed.

Pearson L.J. I agree.

Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

Solicitors: *Field, Roscoe & Co. for Guy H. Davies, Clerk to the Gloucester County Council; J. Foley Egginton & Co., Sutton Coldfield.*

E. D.

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[9] [1953] 1 Q.B. 8.

[10] [1953] 1 W.L.R. 384; [1953] 1 All E.R. 492, D.C.

[LEEDS ASSIZES.]

MARREN *v.* DAWSON BENTLEY & CO. LTD.

1961
Mar. 8, 9,
13.

Havers J.

[1957 M. No. 690.]

Limitation of Action—Time, computation of—Action founded on tort—Personal injuries sustained on November 8, 1954*—Writ issued on November* 8, 1957*—Whether day of event causing injuries excluded—Meaning of "from"—Limitation Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 2 (1)*—Law Reform (Limitation of Actions, etc.) Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 36), *s.* 2 (1).

On November 8, 1954, an accident occurred whereby the plaintiff was injured in the course of his employment with the defendants. On November 8, 1957, he issued a writ claiming damages for the injuries which he alleged were caused by the defendants' negligence. By their defence the defendants pleaded, inter alia, that the plaintiff's cause of action, if any, accrued on November 8, 1954, and that proceedings had not been commenced within the period of three years thereof, contrary to section 2 (1) of the Limitation Act, 1939. The injuries having been held to have been caused by the defendants' negligence, on the plea as to limitation:—

Held, that the day of the accident was to be excluded from the computation of the period within which the action should be brought and that the defendants' plea therefore failed.

Radcliffe v. *Bartholomew* [1892] 1 Q.B. 161 applied.

Gelmini v. *Moriggia* [1913] 2 K.B. 549; 29 T.L.R. 486 not followed.

ACTION.

On November 8, 1954, the plaintiff, Martin Marren, was injured in the course of his employment with the defendants. By writ of summons issued on November 8, 1957, he claimed damages for his injuries which he alleged were caused by the negligence of the defendants, their servants or agents. By their defence the defendants denied negligence and said that the plaintiff's cause of action, if any, accrued on November 8, 1954, and that proceedings were not commenced within the period of three years thereof contrary to the Limitation Act, 1939, as amended by the Law Reform (Limitation of Actions, etc.) Act, 1954, and that the right of action was barred by effluxion of time. Havers J. held that the injuries were caused by the negligence of the defendants, and only that part of the judgment dealing with the plea under the Limitation Act, 1939, is reproduced in this report.

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

1961

MARREN v. DAWSON BENTLEY & CO. LTD.

H. C. Scott for the defendants. The accident happened at 1.30 p.m. on November 8, 1954, and the cause of action having then accrued the plaintiff could have issued his writ on that day. At common law part of a day counts as a day. Therefore, the first day must be counted as the day on which time started to run, and the last day upon which the plaintiff was entitled to bring his action was November 7, 1957.

There has been no case under the Limitation Act, 1939, directly on this point, but there are authorities under other Acts in which a period of limitation is prescribed. In *Radcliffe* v. *Bartholomew*[1] it was held that the day on which the alleged offence was committed was to be excluded from the computation of the calendar month within which the complaint was to be made under section 14 of the Act for the Prevention of Cruelty to Animals (12 & 13 Vict. c. 92), and the judgments of the court refer to *Williams* v. *Burgess*[2] and *Hardy* v. *Ryle*,[3] but all those cases should be distinguished as in them the statutes in question provided that an act had to be done "within" a certain time, whereas section 2 (1) of the Act of 1939, as amended, provides that an action shall not be brought "after the expiration of" three years.

The reasoning of Channell J. in *Gelmini* v. *Moriggia*[4] is to be preferred, namely, that the action can only be brought when the cause of action is complete. It follows that the day upon which the cause of action is complete is one of the days upon which the action can be brought. Time begins to run on that day and the days must be calculated inclusively. The submission by the authors of Preston and Newsom on the Limitation of Actions, 3rd ed., pp. 11 and 12, that the court should follow *Gelmini* v. *Moriggia*[4] in preference to *Hardy* v. *Ryle*[5] ought to be accepted, and the Irish case of *Somers* v. *Erskine* (*No. 2*)[6] to which they refer may be distinguished as there was no evidence in that case as to the time of day at which the cause of action was complete. Accordingly, this action is statute-barred as the writ was issued too late.

G. F. P. Mason for the plaintiff. The law is accurately stated in Halsbury's Laws of England, 2nd ed., vol. 32, p. 42, para. 207. The general rule in cases in which a period is fixed within which a person must act or take the consequences is that the day of the act or event from which the period runs should not be counted against him. Words of limitation are not construed differently in civil and criminal cases. Under R.S.C., Ord. 64, r. 12, any particular number of days prescribed by the rules is reckoned exclusively of the first day and inclusively of the last day. In *Radcliffe* v. *Bartholomew*[7] the Divisional Court approved the decisions in *Williams* v. *Burgess*[8] and *Hardy* v. *Ryle*,[9] and Wills J. thought that the case was governed by authority. The general rule was applied in *Pugh* v. *Leeds (Duke)*[10] and *Goldsmiths' Co.* v. *West Metropolitan Railway Co.*[11] and applies equally in this case.

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[1] [1892] 1 Q.B. 161; sub nom. *Ratcliffe* v. *Bartholomew*, 8 T.L.R. 43, D.C.

[2] (1840) 12 Ad. & El. 635; 9 Dowl. 544.

[3] (1829) 9 B. & C. 603.

[4] [1913] 2 K.B. 549; 29 T.L.R. 468.

[5] 9 B. & C. 603.

[6] [1944] I.R. 368.

Gelmini v. *Moriggia*[12] was a case in contract and there the cause of action was complete at the beginning of the first day and an action could have been brought on that day. In tort the cause of action may not accrue until late in the day, and on the hypothesis that the limitation period was reduced to one day the position would be absurd, for no action would then lie. Therefore, *Gelmini* v. *Moriggia*[12] should be distinguished and the reasoning of the court in *Radcliffe* v. *Bartholomew*[13] applied.

Cur. adv. vult.

March 13. HAVERS J., after determining the issues of negligence and assessing damages at £2,880, continued: I have now to deal with the point of law raised that the action is barred by the Limitation Act, 1939, s. 2 (1), which provides: "The following "actions shall not be brought after the expiration of six years "from the date on which the cause of action accrued, that is to "say: (*a*) actions founded on simple contract or on tort. . . ." This section has been amended by the Law Reform (Limitation of Actions, etc.) Act, 1954, section 2 (1) of which provides: "At the "end of subsection (1) of section 2 of the Limitation Act, 1939 "(which subsection provides, amongst other things, that there "shall be a limitation period of six years for actions founded on "simple contract or on tort) the following proviso shall be inserted—'Provided that, in the case of actions for damages for negli"'gence, nuisance or breach of duty . . . where the damages "'claimed by the plaintiff for the negligence, nuisance or breach "'of duty consist of or include damages in respect of personal

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[7] [1892] 1 Q.B. 161.
[8] 12 Ad. & El. 635.
[9] 9 B. & C. 603.
[10] (1777) 2 Cowp. 714.
[11] [1904] 1 K.B. 1; 20 T.L.R. 7, C.A.
[12] [1913] 2 K.B. 549.
[13] [1892] 1 Q.B. 161.

" 'injuries to any person, this subsection shall have effect as if " 'for the reference to six years there were substituted a reference " 'to three years.' "

This accident occurred at 1.30 p.m. on November 8, 1954. The writ was issued on November 8, 1957. Mr. Scott contends that, as the accident happened at 1.30 p.m. on November 8, 1954, the plaintiff, if he liked, could have issued his writ that day, and therefore the last day upon which he would be entitled to bring his action would be November 7, 1957, and that, as this writ was issued on November 8, 1957, his action is barred by the statute.

There is a rather remarkable lack of authority on this point. Indeed, there has been no case which has directly decided the point under the Limitation Act, 1939, but there has been a number of authorities dealing with other Acts in which Parliament has made a statutory provision of a somewhat similar character. I refer to a passage in Halsbury's Laws of England, 2nd ed., vol. 32, p. 142: "207. The general rule in cases in which a period "is fixed within which a person must act or take the consequences is that the day of the act or event from which the "period runs should not be counted against him. This rule is "especially reasonable in the case in which that person is not "necessarily cognisant of the act or event; and further in support "of it there is the consideration that, in case the period allowed "was one day only, the consequence of including that day would "be to reduce to a few hours or minutes the time within which "the person affected should take action. 208. In view of these "considerations the general rule is that, as well in cases where "the limitation of time is imposed by the act of a party as in "those where it is imposed by statute, the day from which the "time begins to run is excluded; thus, where a period is fixed "within which a criminal prosecution or a civil action may be "commenced, the day on which the offence is committed or the "cause of action arises is excluded in the computation. . . ."

I was referred to a number of older authorities. The one to which I attach great importance is *Radcliffe* v. *Bartholomew*.[1] This was a decision of the Divisional Court. It was concerned with the construction of section 14 of the Act for the Prevention of Cruelty to Animals (12 & 13 Vict. c. 92), and under that section every complaint under the provisions of the Act was to be made "within one calendar month after the cause of such complaint "shall arise."

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[1] [1892] 1 Q.B. 161; sub nom. *Ratcliffe* v. *Bartholomew*, 8 T.L.R. 43, D.C.

The headnote reads: "On June 30 an information was laid "against the appellant in respect of an act of cruelty alleged to "have been committed by him on May 30. An objection to the "jurisdiction of the justices having been taken, on the ground "that the complaint had not been made within one calendar "month after the cause of complaint had arisen:—*Held*, that the "day on which the alleged offence was committed was to be "excluded from the computation of the calendar month within "which the complaint was to be made; that the complaint was "therefore made in time, and the justices had jurisdiction to hear "the case."

Wills J. said[2]: "I am of opinion that the decision of the "justices was right. Unless there is something in the suggested "distinction to the effect that the same words are to be construed "differently in civil and criminal cases, I think that the case is "really governed by authority, and that of a very cogent kind. "In *Williams* v. *Burgess*,[3] the language of the section was "'within twenty-one days after the execution,' and it was held "that the day of execution was there to be reckoned exclusively. "In *Hardy* v. *Ryle*,[4] which was an action against a justice for "trespass and false imprisonment, the plaintiff had been dis"charged from custody on December 14, and brought his action "on June 14 following; section 8 of 14 Geo. 2, c. 44, prescribed "that 'no action shall be brought against any justice of the peace "'for anything done in the execution of his office unless com"'menced within six calendar months after the act committed.' "Except as to the difference between one month and six months, "those words are the same as those which we are now interpret"ing, and it is impossible to draw any distinction between the "language of the two enactments. In that case the court held "that an action brought on June 14 in respect of a cause of "action which had arisen on December 14 was in time, "because the day on which the cause of action arose was "excluded from the computation of the six months, while that "on which the action was brought was included in it. It is true "that the reasoning by which this decision was supported was "criticised by Parke B. in *Young* v. *Higgon*,[5] but that learned "judge suggests no doubt as to the correctness of the conclusion. "At the end of his judgment occur the cogent remarks: 'Apply "'the criterion which has been before suggested—reduce the

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[2] [1892] 1 Q.B. 161, 163.

[3] (1840) 12 Ad. & El. 635; 9 Dowl. 544.

[4] (1829) 9 B. & C. 603.

[5] (1840) 8 Dowl. 212; 6 M. & W. 49.

"'time to one day, and then see what hardship and inconvenience must ensue if the principle I have stated is not to be adopted'; and these remarks are entirely applicable to the present case. The result of reducing the time to one day would be that an offence might be committed a few minutes before midnight, and there would only be those few minutes in which to lay the complaint, which would be to reduce the matter to an absurdity. Therefore, unless a distinction can be established between a statute dealing with criminal, and one dealing with civil, procedure, this case is concluded by authority. It is to be remarked that in *Hardy* v. *Ryle*[6] the enactment was not passed for the purpose of giving the plaintiff a right to sue, but in order to impose a limitation on his unrestricted right, and the authority of that and similar cases is therefore most direct and cogent. It has been suggested that there is a distinction between the construction to be placed on these words according as they occur in statutes dealing with civil or criminal matters, and that in the latter case the day on which the offence is committed ought to be included in the computation of the time allowed for laying the complaint; but no authority has been shown for the existence of such a rule, which would be most unsatisfactory in its operation if it really existed. Great mischief might, and almost certainly would, arise from altering the canon of construction of the same words, according to the subject-matter with which they dealt; and there being no authority in support of so broad a proposition, I am certainly not inclined to make one. The complaint was therefore in time, and the justices must proceed with the hearing of the summons."

Lawrance J. gave judgment to the same effect.

This was a decision of the Divisional Court which followed *Williams* v. *Burgess*[7]; it cited with approval *Hardy* v. *Ryle*; and it referred to the fact that although the reasoning by which the decision was supported in *Hardy* v. *Ryle* was criticised by Parke B., that learned judge suggested no doubt as to the correctness of the conclusion.

The learned authors of Preston & Newsom on the Limitation of Actions, 3rd ed., p. 12, refer to an Irish case, *Somers* v. *Erskine* (*No. 2*),[8] in which it was held that, if the cause of action accrued on January 30, 1934, a writ issued on January 30,

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[6] 9 B. & C. 603.

[7] 12 Ad. & El. 635.

[8] [1944] I.R. 368.

1940, was in time. I have not had the advantage of seeing that report, but the learned authors say this: "This decision was "founded on the fact that there was no evidence at what time "of day a cause of action was complete, so that 'the court is not "'satisfied that an action could have been instituted that day.'" If the decision is based on that, I should not be prepared myself to follow it. I think the finding itself is consistent with the judgment to which I have just referred and is correct.

The learned authors also refer to a more recent decision of Channell J. in *Gelmini* v. *Moriggia.*[9] In the headnote to that case it says: "By section 3 of the Limitation Act, 1623, 'All actions "'. . . shall be commenced and sued within the time and limita-"'tion hereafter expressed, and not after (that is to say) . . . "'within six years next after the cause of such actions or suit.' "The time for payment of a promissory note expired on Saturday, "September 22, 1906. The writ in an action upon the note "against the maker was issued on Monday, September 23, 1912:— "*Held*, that inasmuch as the cause of action was complete at "the commencement of September 23, 1906, that day must be "included in calculating the six years within which the action "could be brought under the statute; that therefore the six years "expired on Sunday, September 22, 1912, and the writ was "issued too late."

Channell J. said[10]: "Upon the point with regard to the "Limitation Act, 1623, I have a very clear opinion." I need hardly say that that learned judge's very clear opinion does make me somewhat diffident in disagreeing with that point. "It "is remarkable that there is no express decision upon the "point after so many years, and the fact that it is now raised "by Mr. Moresby for the first time is a proof of his ingenuity. "In the textbooks it is assumed that the action must be com-"menced within six years from the day on which the cause of "action is complete, including that day. In *Morris* v. *Richards*,[11] "Mr. Commissioner (afterwards Mr. Justice) Wills had two "points to decide: first, whether the rule as to days of grace, "which was then mercantile usage, but which has since become "statutory, had the force of law. He decided that it had. But "he held that that rule, being established as a matter of custom, "must be construed with the custom that when the last day of "grace expired on a Sunday the bill or note was payable on

[9] [1913] 2 K.B. 549; 29 T.L.R. 486.

[10] [1913] 2 K.B. 549, 551.

[11] (1881) 45 L.T. 210.

"Saturday. That decision is not of great importance because in "the following year the law became statutory, nor has the case "much bearing on the present case, except that everybody then "assumed that if a writ had been issued under the same circumstances as in the present case, namely, on the Monday, it "would have been too late. The last day upon which the writ "in that case could have been issued, on that assumption, "happened to be a Sunday." He then deals with the rules of the Supreme Court, and I do not think that affects it one way or the other. In the next paragraph he says: "The "other point is, what is the true rule as to the computation of "the six years under that statute? An action cannot be brought "until the cause of action is complete, and in all cases of contract the person who has to pay has the whole of the day upon "which payment is due in which to pay; therefore until the "expiration of that day an action cannot be brought because "until then there is no complete cause of action. The result is "that an action cannot be brought until the next day; but it can "be brought on that day because the cause of action is complete "at the commencement of that day. If the cause of action is not "complete, the action cannot be brought. It therefore follows "that that day is one of the days upon which the action can be "brought. The words of the statute are 'within six years next "'after the cause of such action or suit.' Now the day after "that on which the debtor's time for paying expires is, in my "opinion, the date on which the cause of action arises, and on "that day an action can be brought, and that day is the first of "all the days in the six years. Therefore, assuming that the "day upon which the action can be brought to be a Thursday, "and the period for bringing the action to be a week, the creditor "can bring it at any time up to and including the following "Wednesday, but not the Thursday. And the same rule applies "where the period, as under the statute, is six years. I do not "think that the day on which the cause of action arises is "excluded. It is the previous day which is excluded, i.e., the "day at the expiration of which the cause of action becomes "complete. Any other construction would place upon the statute "an interpretation which has not hitherto been accorded to it. "Therefore, so far as the cause of action arises on the promissory "note, the writ was issued too late."

It is significant that none of the cases to which I have referred were cited to the learned judge in that case. Neither *Radcliffe*

v. *Bartholomew*[12] nor *Hardy* v. *Ryle*[13] were cited to him. I think that the principle which was established by the Divisional Court in *Radcliffe* v. *Bartholomew* is of general application to statutes whether they deal with civil or criminal matters, and that the rule which the Divisional Court in that case laid down is of general application. I think, therefore, that I am bound by that decision. But if I am not bound by it, and it is upon me to choose between *Radcliffe* v. *Bartholomew* and the decision of Channell J., then I prefer the decision in *Radcliffe* v. *Bartholomew* and the reasons on which it is based.

Therefore, in my view, the plea that the action is barred by the Limitation Act, 1939, is bad; therefore the defence in the action must fail and there must be judgment for the plaintiff for the amount I have already indicated.

Judgment for the plaintiff for £2,880 with costs.

Solicitors: *Turner & Wall, Keighley; A. V. Hammond & Co., Bradford.*

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[12] [1892] 1 Q.B. 161.

[13] 9 B. & C. 603.

WORKMAN *v.* COWPER.

1961
Feb. 2.

Lord Parker C.J., Winn and Widgery JJ.

Animal—Dog—Killing—Lawful excuse—Test—Foxhound running wild on common land—Owner unknown—Possible future danger to sheep and lambs—No real or imminent danger—Shot by person not the owner of sheep and lambs—Whether shooting lawfully justified—Malicious Damage Act, 1861 (24 *&* 25 *Vict. c.* 97), *s.* 41.

The defendant, acting on the authority of the master of a local pack of hounds, shot a foxhound, the owner of which was at the material time unknown, which had been running wild on common land, all attempts to catch it having failed. The defendant came upon the hound while it was sleeping and, believing he could not catch it, deliberately shot and killed it. He was charged with maliciously killing a dog, namely, the hound, contrary to section 41 of the Malicious Damage Act, 1861.[1] The justices found that the lambing season had started and a stray hound was likely to cause damage to livestock but that no actual damage was known to have been done by the hound. They were of opinion that the defendant had acted on the best authority he could obtain, and had acted reasonably, and dismissed the information. On appeal by the complainant:—

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[1] Malicious Damage Act, 1861, s. 41: "Whosoever shall unlawfully "and maliciously kill, maim, or "wound any dog, bird, beast, or "other animal, not being cattle, but "being either the subject of larceny "at common law, or being ordin- "arily kept in a state of confinement,

Held, that in deciding whether there was lawful excuse for killing a dog, the test was the same whether the shooting was done by an owner in defence of his own property or by a person in defence of the property of another; to justify the shooting there must be a real and imminent danger to other animals and as, on the facts of the present case, there was no real or imminent danger to other animals at the point of time when the shooting took place, no lawful excuse had been shown and the case must go back to the justices with a direction to convict.

Dictum of Scott L.J. in *Cresswell* v. *Sirl* [1948] 1 K.B. 241; 63 T.L.R. 620; [1947] 2 All E.R. 730, C.A., applied.

Dictum of Lord Goddard C.J. in *Goodway* v. *Becher* [1951] 2 All E.R. 349, 350, D.C., explained.

CASE STATED by Oxford justices sitting at Henley-on-Thames.

On March 10, 1960, an information was preferred by the appellant, Bernard Workman, against the respondent, Cecil Featherstone Cowper, alleging that he, on February 28, 1960, at Peppard Common in the county of Oxford, did maliciously kill a certain dog, namely, a foxhound, the property of a person or persons unknown, contrary to section 41 of the Malicious Damage Act, 1861.

The justices heard the information on April 5, 1960, and found the following facts: A foxhound had been living wild in and around Peppard Common since about the end of December, 1959. Unsuccessful attempts to catch the hound had been made by, among others, officers of the National Canine Defence League. In December, 1959, the presence of the hound had been reported to Robert Douglas Norman Phillips, the master of the South Berkshire Hounds, which were hunted in the area of Peppard Common, but no hound was missing from his pack. The lambing season was approaching and a stray hound was likely to cause damage to livestock but there had been no damage which was known to have been done by this hound. It had been fed by various persons and was in very good condition. The master of

"or for any domestic purpose, shall, "on conviction thereof before a justice of the peace, at the discretion "of the justice, either be committed "to the common gaol or house of "correction, there to be imprisoned ". . . for any term not exceeding "six months, or else shall forfeit and "pay, over and above the amount of "injury done, such sum of money "not exceeding £20 as to the justice "shall seem meet."

the South Berkshire Hounds, as master of the pack hunting the area, considered himself responsible for any hound, whether or not it came from his pack, and for all damage done by any hound in the area in which he hunted his pack. On a Sunday in February the master of the South Berkshire Hounds, armed with a shot gun, went with others, including a police constable, to try to find the hound, intending to shoot it if he was unable to catch it, but he failed to find it, and on that Sunday he authorised the respondent to kill the hound if he could not catch it. On February 22, 1960, one Robert James Horsfall informed the respondent that if he shot the hound he would be committing an offence. Robert James Horsfall was not the owner of the hound and was not acting on the authority of the owner, and the respondent knew he had no authority from any person purporting to be the owner of the hound. On February 28 the respondent found the hound asleep and, believing that he could not catch it, deliberately shot it dead. After it was dead the hound was found to have ear marks indicating that it came from the Craven Farmers' pack of hounds. A hound from that pack had been lost in November, 1959, but that was not known either to the respondent or to the master of the South Berkshire Hounds up to the time that the hound was killed. One of the joint masters of the Craven Farmers' pack, when informed of the action taken, approved it.

It was contended on behalf of the appellant that the onus of proof was on the respondent to justify killing the hound; that a justification for killing a hound might be that the hound was actually attacking or was about to attack or was likely to renew an attack on a person or that person's or his master's property; and that then the test was whether in shooting the hound the person was acting reasonably in regarding the shooting as necessary for the protection of the person or the property; and that none of those circumstances existed in the present case.

It was contended on behalf of the respondent that he acted reasonably, and that there was danger to livestock from such a hound living abroad, but that there might be a technical offence.

The justices were of the opinion that neither the appellant nor the master of the South Berkshire Hounds nor the respondent was the owner of the hound; that the owner could not reasonably have been ascertained while the hound was at large; that the respondent had acted on the best authority he could reasonably obtain, namely, that of the master of the pack of hounds which hunted in the district; that he had acted reasonably in all the circumstances; and they relied on the explanation of Lord Goddard C.J. in *Goodway* v. *Becher*,[2] that the word "maliciously" in section 41 of the Act of 1861 must be given some meaning and if in all the circumstances the respondent acted reasonably he could not be said to have acted maliciously in killing the hound and, accordingly, they dismissed the information. The appellant appealed.

Edward Sutcliffe Q.C. and *Henry Newman* for the appellant. This appeal turns on the meaning of the words "unlawfully and "maliciously" in section 41 of the Malicious Damage Act, 1861, the only question being: Did the respondent unlawfully and maliciously kill the hound? It is submitted that he did, as, on the facts, none of the circumstances which would have justified him in killing the hound existed. The law applicable to this matter is laid down by Scott L.J. in *Cresswell* v. *Sirl*.[3] To justify killing an animal it must be established (1) that at the time of shooting, the animal was either (a) actually attacking other animals, or (b) if left at large would renew the attack so that the animals would be left presently subject to real and imminent danger unless renewal was prevented; (2) that either (a) there was no practicable means, other than shooting, of stopping a present attack or preventing such renewal, or (b) that the defendant, having regard to all the circumstances in which he found himself, acted reasonably in regarding the shooting as necessary for the protection of the animals against attack or renewed attack. The law as laid down by Scott L.J.[4] does not permit a person to shoot an animal merely because justices, of their local knowledge, are of opinion that an animal at large is likely to make an attack on other animals in the future. There must be a real and present danger to other animals.

As to the defence that the respondent acted reasonably, the justices, when considering the meaning of "reasonably," relied on *Goodway* v. *Becher*.[5] It is submitted that when considering the meaning of "reasonably" the justices took the word out of the context in which it had been used by Lord Goddard C.J. in *Goodway* v. *Becher*[6] and approached the matter in the wrong way.

Had the hound actually been attacking other animals there would have been nothing wrong in shooting it, but that was not the case, because it was shot while sleeping. Moreover, there was no evidence that it was likely to attack other animals. In those circumstances there was no lawful justification for the shooting and the respondent should have been convicted.

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[2] [1951] 2 All E.R. 349, D.C.

[3] [1948] 1 K.B. 241; 63 T.L.R. 620; [1947] 2 All E.R. 730, C.A.

[4] [1948] 1 K.B. 241, 249.

[5] [1951] 2 All E.R. 349.

[6] Ibid. 350.

John Wood for the respondent. It is not an offence to shoot a dog. The appellant's contention is that to justify the shooting there must be some real likelihood that the animal will cause damage to property, e.g., if the owner of a dog thinks that his dog is likely to worry sheep he may kill it, but section 41 of the Act of 1861 makes no reference to the protection of property. The offence created under the Act is "unlawfully and maliciously" to kill any animal. "Unlawfully" has never been defined in connection with section 41. It is submitted that it means without proper authority or excuse. Authority must mean the authority of the owner. A proper excuse ought to be permitted to include something other than the need to protect property. If upon the facts found and proved a reasonable man would think the shooting necessary, that ought to be considered a proper excuse. In the present case the respondent did think the shooting necessary. All the cases concern the protection of property but there appears to be no general test of unlawfulness. They are all dealt with on the basis of reasonableness: see *Gott* v. *Measures* [7] and *Cresswell* v. *Sirl*.[8]

As to the meaning of maliciously, see *Reg.* v. *Cunningham*,[9] where the Court of Criminal Appeal, when considering the meaning of maliciously in section 23 of the Offences against the Person Act, 1861, accepted the definition in Kenny's Outlines of Criminal Law, 16th ed. (1952), p. 186, as an accurate statement of the law, namely, that "maliciously" in a statutory crime required (1) an actual intention to do the particular kind of harm that was in fact done; or (2) recklessness as to whether such harm should occur or not.

[Lord Parker C.J. In *Cresswell* v. *Sirl* [10] Scott L.J. used the word "maliciously" as reasonably. In *Goodway* v. *Becher* [11] Lord Goddard C.J. used it as intentionally.]

If "maliciously" is to be equated with intentionally, it is impossible to reconcile the cases. If it is to be interpreted with regard to reasonableness, it is possible to do so.

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[7] [1948] 1 K.B. 234; 63 T.L.R. 555; [1947] 2 All E.R. 609, D.C.

[8] [1948] 1 K.B. 241.

[9] [1957] 2 Q.B. 396; [1957] 3 W.L.R. 76; [1957] 2 All E.R. 412, C.C.A.

[10] [1948] 1 K.B. 241.

[11] [1951] 2 All E.R. 349.

In *Cresswell* v. *Sirl*[12] Scott L.J. was considering the law applicable to the facts of that case. The decision should be limited to cases where questions of property do arise.

[LORD PARKER C.J. Is there any case under the Act of 1861 when the excuse for the act complained of was other than the protection of property?]

There appears to be no such case, but in all the cases decided before the Act was passed the defence was a claim of right: see *Reg.* v. *Twose*,[13] *Reg.* v. *Day*[14] and *Reg.* v. *Clemens*.[15] The belief, though erroneous, that one has a right to do some act excludes criminality.

[LORD PARKER C.J. This shooting was not done with authority, because no one knew who the owner of the hound was. The real reason it was done was because the lambing season was approaching and it was thought that the hound might attack sheep. Therefore it was done for the protection of property.]

That is so, but the killing was not done to protect the respondent's own property, neither was there any immediate danger to other animals, so that the respondent cannot bring himself within *Cresswell* v. *Sirl*.[16] The law as laid down in that case is too narrow. If a person thinks danger is likely to be caused by a hound, he must be entitled to shoot it without acting unlawfully even though he is not acting in defence of his own property. There must be an overriding test of reasonableness. If *Cresswell* v. *Sirl*[16] be the law, then it is submitted that unreasonableness is an ingredient of maliciousness.

Sutcliffe Q.C. in reply. The respondent's belief, as expressed in the case, is very far removed from a claim of right. This was merely a case, and the respondent thought it was, of defending property. As such it is on all fours with *Gott* v. *Measures*[17] and *Goodway* v. *Becher*.[18]

LORD PARKER C.J. This is an appeal by way of a case stated by justices for the county of Oxford sitting at Henley-on-Thames, before whom an information was preferred by the appellant against the respondent that he on February

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[12] [1948] 1 K.B. 241.

[13] (1879) 14 Cox C.C. 327.

[14] (1844) 8 J.P. 186.

[15] [1898] 1 Q.B. 556; 14 T.L.R. 273, C.C.R.

[16] [1948] 1 K.B. 241.

[17] [1948] 1 K.B. 234.

[18] [1951] 2 All E.R. 349.

28, 1960, did maliciously kill a certain dog, namely, a foxhound, contrary to section 41 of the Malicious Damage Act, 1861. The justices dismissed the information, and the question for this court is whether they came to a correct determination and decision in point of law. [His Lordship stated the facts and continued:]

Dismissing the information, the justices said this: "We "were of the opinion that neither the complainant nor Robert "Douglas Norman Phillips nor the respondent (the defendant) "was the owner of the said hound; that the owner could not "reasonably have been ascertained while the hound was at "large; that the defendant acted on the best authority he could "reasonably obtain, namely, that of the master of the pack of "hounds which hunted in the district, the said Robert Douglas "Norman Phillips; that the respondent (the defendant) acted "reasonably in all the circumstances," and they go on: "and "we relied on the explanation of Lord Goddard C.J. in the "case of *Goodway* v. *Becher*,[1] that the word 'maliciously' in "the section must be given some meaning and if in all the "circumstances the respondent (the defendant) acted reasonably "he could not be said to have acted maliciously in killing the "hound and accordingly we dismissed the information."

The law in regard to the right of a man to shoot a dog for the protection of his own property has been settled by *Cresswell* v. *Sirl*.[2] There had been a number of old cases dealing with the matter, but this was the first time for more than 100 years that the matter had come up for decision of the courts, and in this case, the Court of Appeal. Scott L.J. said[3]: "After a con"sideration of all the authorities above mentioned (to many of "which, as already stated, the attention of the court below "was not directed), we come to the conclusion that the law "applicable to the facts of the present case is less narrow than "the county court judge holds in his judgment. Chasing by "dogs which causes any real and present danger of serious harm "to the animals chased constitutes an 'attack' which entitles "the owner to take effective measures of prevention. We think "the relevant rules of law may be thus stated: (1) The onus of "proof is on the defendant to justify the preventive measure of "shooting the attacking dogs. (2) He has, by proof, to establish "two propositions, but each proposition may be established in "either of two ways: *Proposition No. 1*: That at the time of

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[1] [1951] 2 All E.R. 349, 350.

[2] [1948] 1 K.B. 241; 63 T.L.R. 620; [1947] 2 All E.R. 730, C.A.

[3] [1948] 1 K.B. 241, 249.

"shooting, the dog was either (*a*) actually (in the above sense) "attacking the animals in question, or (*b*) if left at large would "renew the attack so that the animals would be left presently "subject to real and imminent danger unless renewal was pre-"vented. *Proposition No. 2*: That either (*a*) there was in fact "no practical means, other than shooting, of stopping the "present attack or preventing such renewal, or (*b*) that the "defendant, having regard to all the circumstances in which he "found himself, acted reasonably in regarding the shooting as "necessary for the protection of the animals against attack or "renewed attack."

That is now settled law, and it is accepted by Mr. Wood, for whose argument the court is indebted, that in a case where an owner shoots a dog in protection of his property, he would only be acting lawfully and with lawful excuse if it were shown that proposition No. 1 and proposition No. 2 in Scott L.J.'s judgment in *Cresswell* v. *Sirl* [3] were complied with. Of course, the present case is different, because here the man who shot the dog was not purporting to do so in defence of his own property. At the highest he was doing it to protect other people's property, and it is suggested that in such a case some other test than that laid down by Scott L.J.[3] should be applied. So far as I know, there is no decided case in which this point has arisen, but logically I can seen no difference between the case of a man shooting a dog to protect his own property, and a man shooting a dog to protect his neighbour's property. It seems to me that the test must be the same in both cases.

Applying the test laid down to the circumstances of the present case, it is clear that this hound presented no real and present danger to sheep or lambs, or any other animals. The most that can be said is that it might in the future chase sheep which were in lamb, or attack the lambs when born. But there was no indication at that point of time when the dog was shot that there was any real or imminent danger of that occurring. Accordingly, applying the test in *Cresswell* v. *Sirl* [3] to the facts of this case, no lawful excuse has been shown.

Mr. Wood, however, sought to say that there must be many cases other than the protection of property which would raise lawful excuses for the killing of a dog. He instances a number of such cases: a dog is run over and in mercy it is killed; a dog is killed because it is thought to be mad, although it is not attacking any other animal or person. There are a number of other illustrations, and it was suggested, therefore, that there must be some overriding test, a necessary element of which would be a reasonableness that would cover all the cases.

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[3] [1948] 1 K.B. 241, 249.

I find it quite unnecessary to consider the wider proposition. It seems to me that in the present case the only possible excuse put forward is the protection of property. It is true, as the justices recite, that the defendant got the best authority he could, namely, from the master of the South Berkshire Hounds, but it is quite clear that there was no-one who could give him lawful authority to shoot this dog. Accordingly, in the present case, I find it unnecessary to consider any wider proposition.

I would only add this, that in the passage that I have recited at the conclusion of the justices' opinion, they relied on what Lord Goddard C.J. said in *Goodway* v. *Becher*[4] and particularly on the passage in which Lord Goddard C.J. was referring to a man acting reasonably in all the circumstances.[4] It is enough to say that reference to that case shows perfectly clearly that Lord Goddard's reference to reasonableness was directed, and directed solely, to the second proposition laid down by Scott L.J. in *Cresswell* v. *Sirl*,[5] and that Lord Goddard's remarks in no way affect the test laid down by Scott L.J. in proposition No. 1.

In these circumstances, though having every sympathy with the defendant in this case, I have come to the conclusion that an offence was committed; indeed, in the contentions set out in the case, it is stated that the defendant admitted "that there "might be a technical offence." The justices may well consider that this is a very trivial and technical offence and impose a sentence which reflects that view.

The case must, however, go back to the justices with a direction that they should convict.

WINN J. I agree, and desire only expressly to guard against being supposed to say that defence of property, whether one's own or the property of another, is the only justification which could be raised in answer to such a charge as this. Whether any such justification of another kind, such as my Lord referred to, would be relevant to the issue whether the act done was unlawful, or relevant to the issue whether it was done

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[4] [1951] 2 All E.R. 349, 350.

[5] [1948] 1 K.B. 241, 249.

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maliciously, or to the cumulative effect of the double phrase as used in section 41 of the Act, I would desire to consider if and when that problem presents itself.

WIDGERY J. I also agree.

Appeal allowed with costs.
Case remitted to magistrates with direction to convict.

Solicitors: *Hyde, Mahon & Pascall for Knight & Maudsley, Maidenhead; Simpson, North, Harley & Co. for Collins, Dryland & Thorowgood, Henley-on-Thames.*

E. M. W.

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Lord Parker C.J., Winn and Widgery JJ.

REGINA v. CHERTSEY JUSTICES.
Ex parte FRANKS.

Town Planning—Enforcement notice—Prosecution for non-compliance—Continuing offence — Information charging further offences not heard until more than six months after date—Penalty dated back to previous conviction—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 24 (3)*—Magistrates' Courts Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 104.

Crown Practice — Certiorari — Error of law on face of record — Oral decision—Fine based by justices on misconception of law—Written register of conviction—Oral decision a speaking order.

Justices—Limitation—Continuing offence—Town planning—Breach of enforcement notice—Breaches more than six months prior to date of information.

A farmer failed to comply with an enforcement notice requiring him to discontinue the use of certain land as a caravan site and was convicted of an offence under section 24 (3) of the Town and Country Planning Act, 1947.[1] He continued to ignore the notice and on July 2, 1958, he was convicted of a further offence under the section. As he still continued the offending use, on November 13, 1958, an information was laid against him alleging that he had continued to use or permit the land to be used in contravention of the terms of the notice and of section 24 (3), but that information was not heard until March 9, 1960, on which date justices convicted him and fined him £1,338. Stating the decision of the justices, the chairman said that they would impose a fine at the rate of £3 a day from the date of the last conviction, which was 446 days earlier. The notice of fine served on the farmer did not disclose the basis of the fine.

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[1] Town and Country Planning Act, 1947, s. 24 (3): "Where, by virtue "of an enforcement notice, any use "of land is required to be discon-"tinued, . . . then if any person, "without the grant of permission in "that behalf under this Part of this "Act, uses the land or causes or "permits the land to be used, . . . "in contravention of the notice, he "shall be guilty of an offence and "liable on summary conviction to a "fine not exceeding £50; and if the "use is continued after the convic-"tion, he shall be guilty of a further "offence and liable on summary con-"viction to a fine not exceeding £20 "for every day on which the use is "so continued."

On an application for an order of certiorari to bring up and quash the decision of the justices on the ground that they had acted in excess of jurisdiction, in that they had purported to try an information, and to convict and fine the applicant in respect of offences alleged to have been committed more than six months before the date on which the information had been laid:—

Held, (1) that the offence was a continuing offence which occurred from day to day, and the justices were precluded by section 104 of the Magistrates' Courts Act, 1952,[2] from hearing the information in so far as it alleged an offence occurring more than six months before its date.

Verney v. *Fletcher* (*Mark*) *& Sons Ltd.* [1909] 1 K.B. 444; 25 T.L.R. 248, D.C. and *Reg.* v. *Slade, Ex parte Saunders* [1895] 2 Q.B. 247, D.C. applied.

(2) That on the true construction of the words in the final sentence of section 24 (3) of the Town and Country Planning Act, 1947, a person who committed a further offence was liable to a fine not exceeding £20 for every day on which an offence triable by the justices was committed, and therefore, as the justices were not, by virtue of section 104 of the Magistrates' Courts Act, 1952, concerned with an offence committed on any day more than six months prior to the date of the information, they could not impose a daily penalty in respect of any such day.

(3) That where the decision of the bench was announced orally it was that oral order and not the written register of conviction which an applicant for an order of certiorari must seek to quash, and as the oral decision in the present case was a speaking order giving reasons which disclosed an error of principle certiorari would go and the conviction would be quashed.

APPLICATION for order of certiorari.

The following facts are taken substantially from the judgment: The applicant, Eric Ralph Pentz Franks, was the owner and occupier of Glenridge Farm, Callow Hill, in the urban district of Egham in the county of Surrey. He used the land at all material times as a caravan site, certain caravans and other movable dwellings being stationed thereon. On October 7, 1957, the Egham Urban District Council, to whom the appropriate powers had been delegated by the Surrey County Council, the local planning authority under the Town and Country Planning Act, 1947, served on the applicant an enforcement notice under section 23 of the Act, requiring him to discontinue the use of the land as a caravan site, on the grounds that such use had been begun without permission. He was required to remove the caravans from the land. The applicant failed to comply with the enforcement notice, and on July 2, 1958, he was convicted by justices of an offence under section 24 (3) of the Act. Notwithstanding that conviction the applicant continued to ignore the enforcement notice, and on December 17, 1958, he was convicted of an offence of the kind created by the final sentence of section 24 (3) of the Act, namely, of continuing the offending use after his initial conviction, and fined £334, a sum calculated at the rate of £2 a day over a period of 167 days' default. The applicant appeared to have been undeterred by those two convictions because his use of the land as a caravan site continued, and on November 13, 1959, a further information was laid on behalf of the Egham Urban District Council alleging an offence under section 24 (3). That information, after reciting the conviction of December 17, 1958, alleged that the applicant had nevertheless continued "and continues to use or permit to be "used the said land in contravention of previous planning control "and of the terms of the said notice and of section 24 (3) of the "Town and Country Planning Act, 1947." The information was not heard until March 9, 1960, but on that date the applicant was convicted of the offence with which he was charged and fined £1,338. The notice of fine subsequently sent by the court to the applicant did not disclose how that sum was arrived at. It appeared from an affidavit of one Kenneth Greenwood, a solicitor who appeared on behalf of the applicant before the justices, that in announcing the decision of the justices their chairman used words to the following effect: "We find the case proved and we "shall impose a fine at the rate of £3 a day from the date of "the last conviction to date, that is 446 days."

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[2] Magistrates' Courts Act, 1952, s. 104: "Except as otherwise "expressly provided by any enact"ment, a magistrates' court shall not "try an information or hear a com"plaint unless the information was "laid, or the complaint made, within "six months from the time when the "offence was committed, or the "matter of complaint arose: . . ."

The applicant moved for an order of certiorari to bring up and quash the conviction on the ground that the justices had acted in excess of the jurisdiction of the court in that they had purported to try an information, to convict the applicant and to order him to pay a fine in respect of an offence or offences alleged to have been committed more than six months before the date on which the information had been laid.

Douglas Frank for the applicant. The only question is whether the justices were entitled to impose a fine at the rate of £3 a day for 446 days. This was a continuing offence: see section 24 (3) of the Town and Country Planning Act, 1947. In the case of an offence continuing from day to day time runs from the date of each offence charged as a separate offence. The justices had no jurisdiction to hear the information in respect of any offence alleged to have been committed more than six months prior to the date of the information: see section 104 of the Magistrates' Courts Act, 1952. They were not entitled to impose a daily penalty in respect of an offence committed on any day prior to that date. [Reference was made to *Reg.* v. *Slade, Ex parte Saunders* [3] and *Reg.* v. *Willesden Justices, Ex parte Utley.*[4]]

The Administration of Justice Act, 1960, does not apply to the present case and therefore it is submitted that the conviction should be quashed.

Neil McKinnon Q.C. and *Jeremiah Harman* for the local authority. This case can be distinguished from *Slade's* case.[5] It is admitted that this is a continuing offence, but on the clear language of the statute only one offence is created: see section 24 (3) of the Act of 1947. The latter part of the subsection lays down a yardstick to ascertain what the fine should be. If the offence continues right up to the time of the hearing of the information the justices have jurisdiction to deal with it. Once they have jurisdiction, and they convict, that is an end of the matter. The fact that their power to impose penalties may be limited does not affect their jurisdiction. [Reference was made to *Chepstow Electric Light and Power Co.* v. *Chepstow Gas and Coke Consumers Co.*[6]]

[WINN J. In *Rowley* v. *Everton & Sons Ltd.*[7] this court reviewed this matter in connection with section 14 of the Factories Act, 1937.]

[Reference was made to *Rumball* v. *Schmidt.*[8]] All the cases turn on the precise words of the particular section of the statute creating the offence. There are authorities in which it has been decided that section 11 of the Limitation Act, 1939, has no application in the case of a continuing offence. It would apply to a case where an unlawful act had been discontinued six months before the date of the trial, but if the unlawful act has been continued until a date within the six months' period justices have jurisdiction to consider it and are entitled to impose the penalty which the statute allows. What the penalty should be has to be decided by the court in relation to the length of time the offence has been carried on. [Reference was made to *Morant* v. *Taylor* [9] and *Airey* v. *Smith*.[10]] The only sort of case in which the justices' jurisdiction is ousted is when an offence contains more than one ingredient: see *Vaughan* v. *Biggs*,[11] where the limitation period applied because section 1 of the Litter Act, 1958, provided that it should be an offence if anyone "throws down, drops or "otherwise deposits in . . . and leaves . . ."

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[3] [1895] 2 Q.B. 247, D.C.

[4] [1948] 1 K.B. 397; 64 T.L.R. 21; [1947] 2 All E.R. 838, D.C.

[5] [1895] 2 Q.B. 247, D.C.

[6] [1905] 1 K.B. 198; 21 T.L.R. 21.

[7] [1941] 1 K.B. 86; 57 T.L.R. 86; [1940] 4 All E.R. 435, D.C.

[8] (1882) 8 Q.B.D. 603, D.C.

If an offence has been continuing for some time and a summons is served in respect of every day on which the offence has been committed, there will be separate offences in respect of each day to which the particular summons refers, but if a summons refers to the commission of the offence over a period such as a week, there is only one offence.

[WINN J. Can *Verney* v. *Fletcher (Mark) & Sons Ltd.*[12] be reconciled with that submission. Lord Alverstone remarked [13] that while the offence continues it is an offence committed every day.]

Verney's case [14] was decided under a different Act and can be distinguished. It may be that it is an offence committed every day, but at the time when the summons is heard it is still only one offence. Under the Act of 1947 the justices may impose a penalty of £20 a day for as long as the wrongful act has continued provided that the defendant has not already been dealt with for any previous offence.

[LORD PARKER C.J. You are driven to say that unless some common law doctrine that a defendant cannot be penalised twice can be invoked the penalty can be carried back to the first conviction.]

[WINN J. Prima facie one would lean against a construction that would give justices power to impose a penalty in respect of a period greater than six months.]

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[9] (1876) 1 Ex.D. 188, C.A.

[10] [1907] 2 K.B. 273; 23 T.L.R. 447, D.C.

[11] [1960] 1 W.L.R. 622; [1960] 2 All E.R. 473, D.C.

[12] [1909] 1 K.B. 444; 25 T.L.R. 248, D.C.

[13] [1909] 1 K.B. 444, 447.

[14] [1909] 1 K.B. 444.

The court should not lean against such a construction. The question is whether the justices can have regard to the whole of the offence from the date when it began, or chop off the last six months and merely have regard to that. They are entitled to deal with the whole offence and there is no limitation under the subsection on the penalty they have power to impose subject only to the daily penalty of £20 prescribed by the Act.

Lastly, there is no error in law on the face of the record. Certiorari is not the right remedy here. The proper remedy would have been appeal against sentence.

Jeremiah Harman following. The restriction contained in section 104 of the Magistrates' Courts Act, 1952, is that a court of summary jurisdiction shall not try an offence committed more than six months before the date of the information. It is stated in Halsbury's Laws of England, 3rd ed., vol. 25, p. 166, that the time limit does not apply to continuing offences. The proper way to regard this matter is to consider whether the information as laid alleges an offence which ceased more than six months before the date of the information or whether it continued into the six months' period. If it ceased, it could not be tried by the justices. That does not apply to the present case. This information alleges two things, (1) that the offence continued after December 17, 1958, and (2) that it still continues. That must mean that it was still continuing at the date of the information. Therefore plainly the justices had jurisdiction to try it. It is not necessary on this argument to say that the justices can go back as far as the first conviction. The offence under section 24 (3) of the Act of 1947 is of using land in contravention of an enforcement notice, not of using the land after conviction. If that is so, the question is: What was the appellant charged with the second time he was charged? He was charged with a further offence of contravening the enforcement notice. It would be right for the justices to go back to the beginning of the offence, subject only to the overriding principle of common law that no man should be put in peril twice. That principle cannot be overridden without express words in a statute, and there are no such express words here.

There is no reason why this court should not take a different view from that taken in *Verney* v. *Fletcher (Mark) & Sons Ltd.*[14]

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[14] [1909] 1 K.B. 444.

—section 146 of the Factory and Workshop Act, 1901, on which that case turned, is completely different from section 104 of the Magistrates' Courts Act, 1952. There is no similarity between the two cases.

[Winn J. I tendered it to you as a foundation for the first limb of your argument.]

If the court does not feel able to say that *Slade's* case [15] is wrongly decided, it is submitted that it can be distinguished, because it was based on section 11 of the Summary Jurisdiction Act, 1848, the words of which are very different from those of section 104 of the Magistrates' Courts Act, 1952. *Slade's* case [15] is not binding on the court and need not be followed.

Frank in reply. The record is what the justices said in court in giving their decision and not the written entry in the register: *Reg.* v. *Manchester Justices, Ex parte Lever.*[16] The respondent has conceded that the offence must be charged within six months of the date of the information. Once that is conceded, it is an end of the case, because the magistrates cannot impose a penalty for a longer period. There would be devastating consequences if they could. Theoretically the local authority could take no action for a very long period, perhaps even 10 years, and then ask for penalties to be dated back for the whole 10 years. It could hardly be thought that such oppressive powers would be given to a local authority.

Cur. adv. vult.

Feb. 14. Lord Parker C.J. Widgery J. will give the judgment of the court.

Widgery J. In these proceedings Mr. Frank moves for an order of certiorari to bring up and quash a decision of justices of the peace for the county of Surrey sitting in petty session at Chertsey convicting the applicant of an offence under section 24 (3) of the Town and Country Planning Act, 1947, and ordering him to pay a fine of £1,338 and costs. [His Lordship stated the facts and continued:] In attacking the decision of the justices, Mr. Frank referred us to section 104 of the Magistrates' Courts Act, 1952, which is in the following terms: "Except as other-"wise expressly provided by any enactment, a magistrates' court "shall not try an information or hear a complaint unless the

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[15] [1895] 2 Q.B. 247.

[16] [1937] 2 K.B. 96; 53 T.L.R. 687; [1937] 3 All E.R. 4.

"information was laid, or the complaint made, within six months "from the time when the offence was committed, or the matter "of complaint arose: . . ."

Mr. Frank contends that, though the offence charged is a continuing offence committed the day after the initial conviction and thereafter occurring and repeated each day, the time limit in the Magistrates' Courts Act, 1952, runs from each day as though charged as a separate offence. It follows, in his submission, that the justices had no jurisdiction to hear the information so far as it alleged or may be taken to have alleged any offence committed more than six months prior to its date. It would also follow, according to his argument, that the daily penalty of £20 could not be imposed in respect of any day prior to the earliest day to which the justices could have regard for the purpose of deciding whether an offence was then committed. He referred us to *Reg.* v. *Slade, Ex parte Saunders*,[1] where an order for payment of a daily penalty on failure to comply with a closing order under the Public Health (London) Act, 1891, had been quashed on the ground that it could not validly be made in respect of a longer period than that of six months prescribed by section 11 of the Summary Jurisdiction Act, 1848.

Mr. Frank contends that in the present case the justices have clearly imposed the reduced daily penalty of £3 over and in respect of a longer period than that of six months prior to the date of the information, and that as the conviction and sentence occurred prior to the coming into force of section 16 of the Administration of Justice Act, 1960, this court has no power to rectify the error by amendment.

The argument put forward by Mr. McKinnon for the local planning authority can be summarised in three main propositions. First, it is said that the offence of continuing an unlawful use after the initial conviction is a single offence, albeit a continuing one, and that, if that offence continues for as much as one day into the period of six months preceding the information, the justices may hear that information, and section 104 of the Magistrates' Courts Act, 1952, contains nothing to limit the penalty to be imposed when once it is established that the information itself can be heard.

Secondly, and alternatively, Mr. McKinnon says that, if the justices are required to disregard that part of the information which relates to an offence committed outside the six months'

[1] [1895] 2 Q.B. 247, D.C.

period, the daily penalty is no more than a measuring rod to determine the maximum penalty for those offences, and that on proof of an offence within the six months' period the penalty for that offence can be calculated throughout the whole period for which the offending use has continued subsequent to the previous conviction. If this be correct it seems logical that, in the present case, the penalty imposed on March 9, 1960, might have been calculated with reference to the entire period since July 2, 1958, notwithstanding the intervening conviction and fine on December 17, 1958, but Mr. McKinnon says that such apparent duplication of penalties would be contrary to a general principle of the common law that a man may not be punished twice for the same default. Lastly, Mr. McKinnon contends that there is no excess of jurisdiction or error of law on the face of the record and that this is not a proper case for certiorari.

We cannot accept Mr. McKinnon's first contention. In our judgment this continuing offence occurs from day to day, as did the infringement of the Factory and Workshop Act, 1901, in *Verney* v. *Fletcher (Mark) & Sons Ltd.*,[2] and section 104 of the Magistrates' Courts Act, 1952, is effective to prevent the justices from hearing the information so far as it alleged an offence occurring more than six months before its date. Apart from the fact that that occurrence from day to day is a natural feature of such a continuing offence, it seems to us that Mr. McKinnon's insistence upon the offence being one and indivisible is inconsistent with the local planning authority's own view—which we accept—that the conviction on December 17, 1958, did not present the applicant with a defence of autrefois convict when the information of November 13, 1959, was heard.

The question raised by Mr. McKinnon's second contention turns on the proper construction of section 24 (3) of the Act of 1947. After consideration we think that the final sentence of the subsection, namely, "he shall be guilty of a further offence "and liable . . . to a fine not exceeding £20 for every day on "which the use is so continued," is to be construed as meaning a fine not exceeding £20 for every day on which an offence triable by the justices was committed. The alternative meaning which the language of the section could be said to bear would be much more onerous for the offender. If he were to be made liable indirectly to a penalty referable to each day on which he de facto offended but in respect of which no triable offence could have

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[2] [1909] 1 K.B. 444; 24 T.L.R. 248, D.C.

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Ex parte
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been alleged by the information initiating the charge (or if so alleged could not have been the subject of a conviction) some such periphrasis as "to a fine not exceeding an amount equivalent to £20 per day on which . . ." would have been more appropriate and could easily and naturally have been employed. The expression "fine . . . for every day . . ." tends to connote a fine for an offence on a day falling in point of date within the trial jurisdiction rather than a daily factor of calculation of the total.

In our judgment a penal provision of this kind should not be given a wider interpretation in the absence of clear words, and we prefer a construction which avoids the possible duplication of penalties referred to earlier in this judgment even though we recognise that Parliament may have intended to increase the severity of successive sentences as a deterrent to the persistent offender. In view of the terms of section 104 of the Magistrates' Courts Act, 1952, the justices in the present case were not concerned with an offence committed on any day falling more than six months prior to the information, nor could they, in our judgment, impose a daily penalty in respect of any such day.

Even on this basis it was open to the justices to impose a very much heavier penalty than the fine of £1,338 which they inflicted on the applicant, and this is the basis of Mr. McKinnon's submission that no excess of jurisdiction is disclosed in the notice of fine. Where, however, the chairman of justices announces the decision of the bench, it is this oral order and not the written register of convictions which the applicant must seek to quash.

Where, as in this case, the oral decision is a speaking order, and gives reasons which disclose an error of principle, certiorari will go. In the absence of any power to alter the fine, this court must, with some reluctance, quash the conviction.

Appeal allowed with costs.
Certificate that a point of law of general public importance involved.
Leave to appeal refused.

Solicitors: *Sharpe, Pritchard & Co. for Horne, Engall & Freeman, Egham; Champion & Co.*

E. M. W.

C. A.

1960
Nov. 30;
Dec. 1, 2, 5.

1961
Feb. 8.

Sellers,
Holroyd
Pearce and
Devlin L.JJ.

DINGLE *v.* ASSOCIATED NEWSPAPERS LTD. AND OTHERS.

[1958 D. No. 1084.]

Libel and Slander — Damages for libel — Libel published elsewhere — Irrelevance.

Libel and Slander—Damages for libel—Mitigation—Reputation—No settled bad character—Defamatory matter in Select Committee report—Subsequent newspaper article.

Damages—Joint tortfeasors—Liability of one for full damages—Libel—Application of principle—Defamatory report in several newspapers.

On March 17, 1958, the "Daily Mail" and other newspapers published a report of a Select Committee of Parliament containing matter defamatory of the plaintiff. On June 16, the "Daily Mail" published an article relating to the same matter in unprivileged form. On June 26, it published a further article stating that all interested parties had been cleared of any deliberate intent to defraud. In assessing the damages for the libel contained in the article of June 16, the judge mitigated the amount awarded by taking into consideration the effect on the plaintiff's reputation of the same libel appearing in a privileged form previously to, or contemporaneously with, the publication of the libel in suit, and which had been put in evidence by the defendants to refute malice:—

Held, (1) that the judge wrongly took into account the effect of the other publications of the libel, and the damages should be awarded on the basis of the full damage done to the plaintiff's reputation as a result of the publication of the libel.

Saunders v. *Mills* (1829) 6 Bing. 213; *Hobbs* v. *Tinling* (*C. T.*) *& Co. Ltd.* [1929] 2 K.B. 1; 45 T.L.R. 328, C.A. and "*Truth*" (*N.Z.*) *Ltd.* v. *Holloway* [1960] 1 W.L.R. 997, P.C. applied.

Per Sellers L.J. It has not been the law that a man pays less for his defamatory remarks which he cannot justify merely because someone else has published previously or concurrently the same libel. If it were otherwise a defamed man might have no adequate redress, for the full range and extent of publication or republication can rarely, if ever, be traced and established (post, p. 171).

Per Devlin L.J. The fact that a passage in the defamatory article is protected by privilege is irrelevant in the assessment of damages in this case. Privilege attaches to form or occasion but not to substance. A report of a judicial or parliamentary proceeding may be privileged, but if the substance of the matter be cast into another form, the publication is subject to the ordinary law (post, p. 188). As between the plaintiff and the defendant it is immaterial that there are others whose acts also have been a cause of the injury, whether or not those others had or had not a good defence (post, p. 188).

(2) That the damages should not be reduced on the ground that the plaintiff had acquired a bad reputation by reason of the publication of the Select Committee report.

Per Sellers L.J. It cannot be said that a man's reputation has to be judged on the basis that what he has disproved in a court of law has still to be regarded as damaging to his reputation (post, p. 172).

Per Holroyd Pearce and Devlin L.JJ. That reputation in this context meant a settled reputation for bad character (post, pp. 181, 196 et seq.).

Scott v. *Sampson* (1882) 8 Q.B.D. 491 considered.

APPEAL from Pearson J.

The plaintiff, Philip Burrington Dingle, Town Clerk of Manchester, brought an action for defamation in respect of two articles in the issues of the " Daily Mail " newspaper for June 16 and 26, 1958. The first defendants were Associated Newspapers Ltd., proprietors of the " Daily Mail," the second defendant was the editor of the paper, and the third defendant was one Michael Kelly, a journalist employed by the first defendants.

The articles were published during the passage through Parliament of the Manchester Corporation Act, 1958, which concerned, inter alia, the corporation's acquisition of the Ardwick Cemetery. The first article related to Dingle's conduct in writing a letter to the shareholders of the company owning the cemetery on December 2, 1957. That letter had been written after the Bill had been deposited. The article was headed " Cemetery chairman " accuses " and had another heading " Shares were worth twice " what corporation paid for them . . . letter went out while we " were still negotiating." Under the sub-heading " By Michael " Kelly," the article began: " The chairman of Ardwick Cemetery " Ltd., Manchester, the company now the centre of a parliamentary storm, told me yesterday that in his view shares in the " company were worth more than double the £1 each that " Manchester Corporation paid for them. He also alleged that a " letter signed by the town clerk, Mr. Philip B. Dingle, which " led to the sale of the shares was sent out while negotiations " were going on with the corporation for a better offer."

The second article on June 26 was headed: " No prosecutions " after cemetery deal probe." It had a sub-heading: " By " ' Daily Mail ' reporter." The first paragraph said: " No prosecutions will follow Scotland Yard's investigations into the takeover bid for Ardwick Cemetery by Manchester Corporation." The article ended: " All interested parties have been cleared of " any deliberate attempt to defraud."

Pearson J. held that the first article was untrue and unprotected by any defence, that the allegation that the letter went out while negotiations were still pending was justifiable, although this was a minor matter, and he held that the second article was not defamatory. He assessed the damages at £1,100 in respect of the first libel. In assessing the damages Pearson J. took into account the publication on May 17, 1958, in the "Daily Mail," and in other newspapers throughout the country, of a report of the Select Committee of Parliament which was to the same effect as the libel of June 16, which was protected under the Parliamentary Papers Act, 1840.

The plaintiff appealed from the decision of Pearson J., contending that the damages awarded were inadequate and that the judge was wrong in finding that the second article was not defamatory.

The argument is reported solely on this issue of damages; in particular on the issue of mitigation of the damages by reason of the publication in other newspapers of the same libel in a privileged form previously to, or contemporaneously with, the publication of the libel in suit.

Geoffrey Lawrence Q.C. and *W. D. T. Hodgson* for the plaintiff. On any view of the matter which the judge took, the amount he awarded was too small and was entirely out of line with what, it is common knowledge, is awarded by juries in these days. The amount was based (1) on a misdirection, and (2) a misapprehension of certain vital facts.

The history of the matter shows that the plaintiff, who was in a most vulnerable position, was the victim of the most wicked imputation. The figures quoted in the libel for the shares of Ardwick Cemetery Ltd. were admitted to be inaccurate, but no apology was published by the "Daily Mail" at any stage, not even when it was said that the Town Clerk was vindicated. Only in the defence was an apology attempted, but an apology should not be pleaded as a defence. The importance of the figures is that against the background of the criticism of the Town Clerk by the Select Committee anybody could easily rush to conclusions.

The judge misdirected himself: (1) in holding that the damage done by other newspapers was a matter which could, and should, be taken into account in mitigation of damage; (2) he wrongly severed the libel; and (3) he failed to take into account that the second part of the libel had been subject to the plea of justification which failed. The judge thought that that part of the matter had been disposed of by his finding that the parties had been in negotiation when the letter went out to the shareholders of the cemetery. He misapprehended the facts in that he thought because there was a complete vindication and clearance of the plaintiff by the council on July 2 that he had only to consider, for the purpose of damages, the currency of the defamation for about a fortnight.

Where the award of damages is that of the judge alone, and not that of a jury, the appeal is by way of a rehearing on the damages as on all other issues, although before the Court of Appeal will interfere with the award of damages it must be satisfied that the judge has acted on wrong principles of law, or has misapprehended the facts or made a wholly erroneous estimate of the damage suffered: *Davies* v. *Powell Duffryn Associated Collieries Ltd.*[1]; *Nance* v. *British Columbia Electric Railway Co. Ltd.*[2] It is submitted that this is such a case.

The judge wrongly took into account evidence of damage to the plaintiff's reputation by reports in other newspapers, which were not prayed in aid by the defendants in mitigation of damage but solely on the issue of malice. Had there been a jury it would have been submitted that they should not have gone in; and they were admitted for that one purpose only. But the judge said that the plaintiff was a man with a tarnished reputation, which was exacerbated during two weeks, and then the position was cleared up. Yet nothing was pleaded in mitigation of damage touching the plaintiff's reputation; these newspaper reports were relevant to malice alone. The judge therefore took a wrong starting point in assessing damages. Reports appearing in other newspapers showing that the plaintiff's reputation was already damaged are not admissible in evidence in mitigation of the damage caused by the libel: *Saunders* v. *Mills*[3]; *Talbutt* v. *Clark*[4]; nor is evidence of rumours before the publication of the libel to show that the plaintiff was guilty of the offence alleged in the libel: *Scott* v. *Sampson.*[5] Each republication of a libel is a fresh libel: *"Truth" (N.Z.) Ltd.* v. *Holloway.*[6]

The defendants are entitled to pray in aid the general bad reputation of the plaintiff but not specific acts or incidents: *Scott* v. *Sampson*[7]; *Hobbs* v. *Tinling (C. T.) & Co. Ltd.*[8]; *Speidel* v.

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[1] [1942] A.C. 601, 616, 617; 58 T.L.R. 240; [1942] 1 All E.R. 657, H.L.

[2] [1951] A.C. 601, 613; [1951] 2 T.L.R. 137; [1951] 2 All E.R. 448, P.C.

[3] (1829) 6 Bing. 213.

[4] (1840) 2 Mood. & R. 312.

[5] (1882) 8 Q.B.D. 491.

[6] [1960] 1 W.L.R. 997, 1002, P.C.

[7] 8 Q.B.D. 491.

[8] [1929] 2 K.B. 1; 45 T.L.R. 328, C.A.

Plato Films Ltd.[9] The judgment in *Speidel's* case[9] makes it clear that the court was drawing a sharp distinction between evidence of bad reputation and evidence of bad acts. If a Member of Parliament repeatedly defamed a town clerk in Parliament, the reports of it would be covered by privilege, but if the member repeated it outside Parliament, the earlier reports could not be evidence of bad reputation: *Adam* v. *Ward*.[10]

A newspaper that embarks on the publication of defamatory statements is guilty of defamation; the Parliamentary Papers Act, 1840, gives it limited protection in claims for damages. If the paper goes outside that protection, the mere act of excess does not entitle the paper to say that it should only be liable for the excess.

[DEVLIN L.J. Suppose there are many publications of the same libel, can a defendant say that he is only liable for his part of the damage?]

If the plaintiff elects to sue one defendant, the latter does not get the benefit of the other publications; the defendant chosen is not entitled to have a discount. Other torts committed by other defendants are not relevant.

The judge took far too narrow and unrealistic a view of damages for libel. His assessment of damages was based on two wrong deductions from the libel: (1) for loss of reputation which was never pleaded and was based on inadmissible evidence; (2) for what he thought was an ample vindication. If these submissions be right, they vitiate the figure of £1,100 damages, which should be increased to a proper figure for a disgraceful libel on a well-known public figure. Even accepting that the judge found no malice or recklessness, this award was ludicrously small and inadequate.

Hodgson following. This libel cannot be severed; even if it could be severed, it could not be severed into more than two parts.

Neville Faulks Q.C. and *David Hirst* for the defendants. It was wrongly said that it was the defendants' fault—" culpa "—for the judge found that the newspaper had acted with propriety. He also found that the defendants had succeeded in establishing, the onus being on them, that there was no malice. He rightly said that he would not give the plaintiff more damages because of what had been done by other people: *Harrison* v. *Pearce*.[11]

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[9] [1960] 3 W.L.R. 391; [1960] 2 All E.R. 521, C.A.

[10] [1917] A.C. 309, 327, 328; 33 T.L.R. 277, H.L.

[11] (1858) 1 F. & F. 567, 569.

The damage recoverable is that done by the particular tort; joint tortfeasors are in a different position.

One must take the plaintiff with his reputation as one finds it, and then consider the defamation to see how far that reputation has been exacerbated by what the defendants did. Damages are designed to compensate a plaintiff for the wrong done to him; one pays damage only according to the damage that one has caused, not that caused by someone else. Evidence of lack of reputation was not led, but it was elicited in cross-examination. What injured the plaintiff's reputation was the publication of the Select Committee's Report.

Saunders v. *Mills* [12] can be distinguished; there was no plea of justification on the record. It is not a question of what reputation a man should have but of what he had.

[SELLERS L.J. Surely a plaintiff is entitled to establish his actual character?]

An action for defamation is an action for damage to the plaintiff's reputation, and one has to look at that reputation as it was at the time of the libel in order to see how it has been damaged by the defendants. The court cannot make the defendants pay for damage done by the Select Committee: *Sim* v. *Stretch.*[13]

If it emerges from the plaintiff's own case that his reputation is already tarnished, that is enough for mitigation of damages: see *Scott* v. *Sampson*,[14] an authority which is binding on this court. The object of damages is to put a man in the position he was in before the wrong was done, not the position in which he ought to have been. On June 16, readers of the "Daily Mail" were being told something defamatory of the plaintiff, something which they had been told a number of times before plus some unjustifiable embroidery; it is on the unjustifiable embroidery that damages must be paid. It was admitted that the newspapers were taking this up as a matter of news, and it could not be defamatory to repeat that with which the whole country had been humming. Had the libel been published the same day as the other reports, it is conceded that not much could be taken off in mitigation, but the report of the Select Committee was published a month earlier. The judge having before him all these newspaper reports was entitled to take them into account in mitigating the damages.

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[12] 6 Bing. 213.

[13] (1936) 52 T.L.R. 669; [1936] 2 All E.R. 1237, H.L.

[14] 8 Q.B.D. 491, 504.

Rumours of bad reputation are admissible as evidence thereof: *Leicester* v. *Walter*,[15] *per* Lord Mansfield; *Hawkins* v. *Express Dairy Co. Ltd.*[16]

[SELLERS L.J. That is a converse case; there the plaintiff in the course of the case was found to be an untrustworthy workman; here at the end of the case the plaintiff's reputation was as good as it ever was.]

The reputation of the plaintiff at the time of the libel, through no fault of his own, was that of a man who had been "slapped" by the Select Committee. It is for the plaintiff to submit that he had been defamed, but it must be his general reputation at the time of the libel, as it was in the eyes of readers of the "Daily Mail." The defendants should not have to pay damages because of the libels published in other newspapers: *Lionel Barber & Co. Ltd.* v. *Deutsche Bank (Berlin) London Agency*,[17] *per* Lord Atkinson.

It was said that the "Daily Mail" placed a severe stigma on the plaintiff's reputation, which already had a blot on it for which the "Daily Mail" was not responsible, and the judge was right in severing that part of the libel which was privileged from that which was not privileged: *Adam* v. *Ward*.[18] Publication for which a defence is provided under the Parliamentary Papers Act, 1840, should be divided from the rest of the libel. One does not say that some money should be taken off because part of the libel was privileged, but that that part should be put aside.

It was said that there was no apology, but an apology might have been dangerous: *Tracy* v. *Kemsley Newspapers Ltd.*[19] Also there was no request for an apology.

The damage was amply vindicated; one could not say completely. The plaintiff said that everyone in Manchester knew that there was nothing in it, but the judge may have gone too far in using the word "completely," but he used it in inverted commas.

It is only in very special circumstances, which are not shown here, that this court would interfere with the damages awarded.

Hodgson replied.

Cur. adv. vult.

Feb. 8, 1961. SELLERS L.J. stated the facts and continued: I would, therefore, uphold the judge in respect of two out of the three attacks made on the judgment on the issue of liability. He was justified in holding that negotiations were still pending and that the second article relied on by the plaintiff was not actionable. But with respect I agree with the submission for the plaintiff that the judge either disregarded or attached too little importance to the innuendo of the first article that the plaintiff had committed an offence under section 12 of the Prevention of Fraud (Investments) Act, 1939. There would, I think, be many informed readers to whom this would appear a serious matter, and this omission will have to be taken into assessment when the amount of the damages is later considered.

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[15] (1809) 2 Camp. 251, 255.

[16] (1940) 163 L.T. 147.

[17] [1919] A.C. 304, 320; 35 T.L.R. 120, H.L.

[18] [1917] A.C. 309.

[19] The Times, April 9, 1954.

The damages have to be assessed on what has been established as the actionable defamation contained in the first libel with its innuendoes, and the real issue on the appeal has been what matters, if any, have to be taken into consideration in their mitigation.

The submissions of the plaintiff were that in assessing the damages on the basis of the defamation which he found to be actionable (limiting, as it would appear that he did, the full extent of the pleaded innuendo) the judge (a) wrongly took into consideration the effect on the plaintiff's reputation of defamatory statements which had appeared previously and contemporaneously in many other newspapers as well as in the "Daily Mail," which it was submitted were inadmissible as evidence for this purpose and which did not, in any event, affect the defendants' liability for damages, and (b) wrongly held that there had been a complete clearance and vindication of the plaintiff's reputation which limited the damage done to the plaintiff's character to a period of approximately a fortnight following June 18, 1958.

As I read the judgment, the judge did take both these matters into consideration with the undoubted effect that they greatly reduced the damages awarded. Before considering whether the judgment was right or not in these matters it will be necessary to refer as briefly as possible to the circumstances which arose.

When the sections of the Manchester Corporation Bill dealing with the Ardwick Cemetery came up for consideration in Parliament there was a report of the select committee criticising the Town Clerk's letter. This was given wide publicity on May 17, 1958, not only in the "Daily Mail" but in many other papers throughout the country as well. The "Daily Mail" article of that date had large headlines "M.P.s Censure Town Clerk over "Shares" and contained these passages: "The Town Clerk of

"Manchester, Mr. Philip Dingle, has been censured by an all-party group of the M.P.s which investigated share-buying "methods of the City Council. A select committee yesterday "expressed 'unanimous strong disapproval' of a letter written "by Mr. Dingle to shareholders of a cemetery. It added: 'They "'now draw the attention of the House of Commons to the "'facts.' This means there will probably be a debate on the "Town Clerk's action in the Commons after Whitsun. According "to the committee's report, this is what happened: Mr. Dingle "wrote to shareholders owning an old cemetery at Ardwick, "Manchester, saying the corporation wanted to use the land as "playing fields. The corporation offered to pay £1 a share in "compensation. Said Mr. Dingle: 'This is considered a generous "'offer.' Evidence taken by the committee revealed, however, "that the break-up value of the shares was more than £1 each. "Mr. Dingle did not disclose this. Manchester Corporation has "since bought most of the shares. The committee stated: 'The "'corporation obtained the shares by presenting a one-sided view "'which failed to disclose the true position of the company on a "'break-up.'"

Quotations of some part of the committee's report were repeated on June 12, 1958, and on several subsequent occasions including the article complained of in the first libel alleged.

In so far as the article was an extract from the select committee's report all the defendants satisfied the judge that they had acted without malice, and they established protection under the Parliamentary Papers Act, 1840. Therefore, there was in the article complained of defamatory matter which was not actionable because privileged, a little defamatory matter which was justified, and substantial defamatory matter to which there was no defence.

There had been published in other newspapers as well as the "Daily Mail" on May 17, 1958, and June 12, extracts from the report of the select committee, and many other newspapers had been put in evidence by the defendants in the course of the trial to refute the plaintiff's allegation that the defendants acted maliciously, and that they were campaigning against him. The same articles were sought to be used in mitigation of damages.

The judge regarded other articles in the "Daily Mail" before the article complained of and prior and contemporary articles in other newspapers as having a bearing on the assessment of damages. He says that "in so far as the making of the report "and the printing of extracts from it in various newspapers "caused damage to the plaintiff's reputation the defendants are "not responsible for that damage." Another passage in the judgment reads: "As one expects, one finds that this report of "the select committee, which expressed a strong view and strong "disapproval of a local government officer, received substantial "publicity. That must have done substantial damage to the "plaintiff's reputation. For that damage the defendants are not "responsible, and the plaintiff cannot recover for it, therefore, in "this action." And again: "As regards the proper measure of "damages one has to remember that a good deal of damage had "already been done by the publication of the report."

Put in that way, that the defendants are not responsible for damage done by the publication of the report or by other newspaper articles, the statement is unobjectionable, but apart from the harm done by all the criticism over the Ardwick Cemetery transaction, there is nothing at all against the character or reputation of the plaintiff, and the position is, that the judgment has completely vindicated the plaintiff of the imputations against him and there is no evidence remaining of anything to besmirch his character and no evidence at all of bad reputation.

It would be a regrettable situation if a man who has cleared his character of the allegations made against it is to have his damages assessed on the false basis that his reputation is to be regarded, inferentially, as bad on the ground of the very allegations which the action has successfully refuted.

In the recent case of "*Truth*" (*N.Z.*) *Ltd.* v. *Holloway*[1] the Judicial Committee referred to a passage from Gatley with approval and acceptance as follows[2]: "Gatley opens his chapter "on Republication and Repetition with the quotation: 'Every "'republication of a libel is a new libel, and each publisher is "'answerable for his act to the same extent as if the calumny "'originated with him': see Gatley on Libel and Slander, 4th "ed., p. 106. This case is a good instance of the justice of this "rule." So I think is the present case before us.

It has not been the law that a man pays less for his defamatory remarks which he cannot justify merely because someone else has published previously or concurrently the same libel. If it were otherwise a defamed man might have no adequate redress, for the full range and extent of publication or republication can rarely if ever be traced and established and every offender brought to justice. A national newspaper such as the "Daily Mail" penetrates to many readers over a wide area, some of whom may, most of whom probably will not, read any other paper broadcasting matter stated in a report of a select committee of Parliament.

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[1] [1960] 1 W.L.R. 997, P.C.

[2] [1960] 1 W.L.R. 997, 1002.

The press properly have the freedom, if they wish to exercise it, to inform the public of the contents of such a report provided it is done in the public interest and not in any way maliciously, but I see no ground for excusing or benefiting those who publish such matter if they repeat it or the defamatory substance of it in a form which is unprotected, still less if they enlarge and embellish the publication with falsehoods which are highly defamatory and completely untrue.

When the libellous matter is held to be untrue then I fail to see how in justice or good sense it can be said nevertheless that a man's character or reputation has to be judged on the basis that what he has disproved in a court of law has still to be regarded as damaging to his reputation.

In Gatley on Libel and Slander (5th ed., p. 620), the general rule is thus stated: "The defendant cannot prove in mitigation "of damages that some other person or persons have on previous "occasions published the same libel, for the fact that others have "defamed the plaintiff is wholly irrelevant." This rule is derived from *Saunders* v. *Mills*.[3] On that authority the other newspapers, though no doubt rightly introduced by the defendants as evidence to rebut malice, were not admissible in mitigation of damages, and were not at the trial contended to be. The general rule so stated is established law and I see no ground for acceding to the request of the defendants' counsel to hold that *Saunders* v. *Mills* [3] should be reversed, even if it were possible so to do with an authority so old and so frequently applied over the years.

At common law a defendant could not in mitigation of damages give evidence to show that the plaintiff had already commenced an action or recovered damages against some other person or persons for other publications of the same libel. It was irrelevant.

By the Law of Libel (Amendment) Act, 1888, s. 6, liberty was given to newspapers to give evidence in mitigation of damages that the plaintiff had already recovered (or had brought actions for) damages, or had received or agreed to receive compensation in respect of a libel to the same purport or effect for which the action being tried had been brought. By the Defamation Act,

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[3] (1829) 6 Bing. 213.

1952, s. 12, similar provision is made for all and not only for newspapers.

These statutory provisions only emphasise the existence of the general rule of *Saunders* v. *Mills*,[4] and in no way serve to prevent a plaintiff from receiving the full compensation for the wrong done to him but only to prevent him being paid the full damage more than once, or at least to avoid an overlapping of damages, taking into consideration that the matters for assessment may not always have common features affecting the amount of damages, some defendants may have apologised at once most generously, or may have made the publication complained of in excusable circumstances, whereas others may have acted maliciously and sustained their allegation to the end. Damages for libel of the same purport would clearly from the nature and extent of a publication not necessarily be the same against all defendants against whom liability was established, except in the case of joint tortfeasors.

Libel is a tort, but the damage it may do does not from its nature resemble damage by physical injury to the body. In physical injury the damage and loss actually inflicted is constant and should be the same in amount whether one person is liable for it or more. It is not so in libel. What A has published may never have been seen by B's readers, and as the law stands no one could be called in mitigation of damages to say that he had read precisely or the substance of what B had said either on the same day or on some prior occasion. It seems to me to be a salutary and practical rule without which it might be difficult or impossible for a plaintiff to get adequate redress for the wrong done him.

I find much force in the argument of plaintiff's counsel that a previous publication of the same libel cannot be used to establish a bad reputation. Indeed, as the law stands, it is not possible to adduce evidence of particular acts of conduct which could adversely affect a plaintiff's reputation.

Ever since *Scott* v. *Sampson*[5] in 1882 a defendant has been allowed to give evidence of a plaintiff's general bad character only, and not of specific facts and circumstances which a judge or jury might think should establish his character to be bad. Whether this is logical or desirable or not it is long established, and it serves at least to show that any specific allegation which might be said to be detrimental to a man's character could not be used to condemn him—as it is sought to be used here—if it was proved in the course of the trial to be untrue. Where evidence of general bad reputation is called, a plaintiff may, I apprehend, refute it if he can by evidence of general good reputation, and a judge or jury has to decide. This particular allegation of misconduct is refuted and the plaintiff's character and reputation stand where they did.

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[4] 6 Bing. 213.

[5] (1882) 8 Q.B.D. 491.

Scott v. *Sampson*[6] has stood since 1882 and was approved in this court later in *Hobbs* v. *Tinling (C. T.) & Co. Ltd.*,[7] where Scrutton L.J. said that the judgment of Cave J., concurred in by Matthew J., has been accepted as an accurate statement of the law. Certainly this court must so regard it. Scrutton L.J. continued[8]: "On the other hand, the defendant "may not give evidence of rumours at the time of the publication "to the same effect as the libel, nor may the defendant give "evidence of specific facts and circumstances to show the disposition of the plaintiff, as distinct from general evidence that "he has that reputation. If those specific facts are to the same "effect as the libel, which he has not justified, he cannot justify "under the plea of mitigation of damages."

In *Hawkins* v. *Express Dairy Co. Ltd.*[9] Stable J. took into consideration a bad reputation which the plaintiff himself had revealed in evidence showing[10] "misconduct during his "term of service with his employers closely connected with the "subject-matter of the libel. . . ." The evidence showed fraud by the plaintiff known to and indeed participated in by a number of servants of the company with whom he worked. I see no reason to differ from Stable J. There the bad character or reputation was established by the plaintiff and could not be overlooked. The present case is almost the converse of that. Here the substance of the libel has been disproved and nothing remains against the plaintiff's character and reputation.

The only support for the view taken by the judge cited to us on behalf of the defendants was a passage in the judgment of Lord Hanworth M.R. in *Chapman* v. *Lord Ellesmere*,[11] where the Master of the Rolls said[12]: "For these reasons, it seems "that the right course will be to direct a new trial as to paragraphs 3 and 4. The jury should be directed that they cannot "impeach the decision which was reached that the publication

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[6] 8 Q.B.D. 491.

[7] [1929] 2 K.B. 1, 17; 45 T.L.R. 328, C.A.

[8] [1929] 2 K.B. 1, 18.

[9] (1940) 163 L.T. 147.

[10] Ibid. 149.

[11] [1932] 2 K.B. 431; 48 T.L.R. 309, C.A.

[12] [1932] 2 K.B. 431, 457.

"was in the ordinary course of the news agencies' and news-"papers' business; and was a matter which must in any case "have become known to a very large circle through the protected "publication of the Racing Calendar on October 2."

I am not clear, with respect, as to what the Master of the Rolls had in mind. He cannot be held to have thought that at the future trial the protected publication of the "Racing "Calendar" could be put in evidence, for that would be contrary to established authority which was not, it would appear, challenged or argued in the case. I think it was an obiter dictum and but little guide in the circumstances to the decision in the present case.

In the course of the argument reference was made to *Speidel* v. *Plato Films Ltd.*,[13] an interlocutory appeal recently before this court and now on appeal to the House of Lords. The case raised points of pleading and, I think, ultimately of substance, which do not in any way arise in the present case. The defendants here did not seek to give in evidence any specific facts or circumstances outside the libel alleged or the substance of it to show the plaintiff's true character or to call evidence of bad reputation. All that is said, as I understand it, is that having regard to what was published of the Parliamentary report, both contemporaneously in the protected part of the offending article in the "Daily "Mail," and in articles prior thereto in the "Daily Mail" and other newspapers, which was the substance of the libel and nothing independent of it, the judge had to infer and was justified in inferring that the plaintiff's reputation had been lowered thereby and, therefore, in awarding damages, he had to be treated as a man with a sullied reputation.

For the reasons I have already given I do not think any such inference can be relied on. The plaintiff in this action has proved the foundations of any such inference to be false.

I do not think either that the question of the character or reputation which a man has or ought to have and which of these is the relevant consideration in an action of defamation calls for consideration here. No one suggests anything against the plaintiff except the facts and circumstances which here have been in controversy in this case.

I am prepared to say, as I think should be said, in justice to the plaintiff, that he has cleared his character. It is much less satisfactory to an aggrieved man merely to say that he has cleared his reputation for that in itself might be said to give rise to an innuendo.

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[13] [1960] 3 W.L.R. 391; [1960] 2 All E.R. 521, C.A.

I am therefore of opinion that there was no evidence, when the time came for the damages to be assessed, that the plaintiff had either a bad character or a bad reputation so as to limit in any way the damages to be awarded to him for the wrong done by the defendants' statements which defamed him. He had, no doubt, been personally hurt and outwardly damaged by assertions of others, but the action has established that they were false and did not impeach his character or his reputation.

If this is right, then the plaintiff's submission that the judge misdirected himself in this respect in assessing damages succeeds and it fundamentally affects the amount to be awarded.

I think, too, with respect, that the judge went too far in favour of the defendants when he held that there had been clear and complete vindication of the plaintiff by July 2. It would have been of real benefit to the plaintiff if on or about that date there had been a full and frank apology by the defendants and a retraction of all of which the plaintiff could legitimately complain. Merely to say: "There will be no prosecution in the case of the "neglected graveyard," and to head the article "Town Clerk "Cleared," and to set out what the Attorney-General and the Manchester Corporation said, still leaves open the question: "Yes, but what do you say?" Even the mind of a newspaper—which may be made up of the minds of several individuals—could not overlook the hurt which the statements, true or untrue, must have done to the plaintiff, his anguish of mind and distress, and yet there appeared not a word of reinstatement or of regret, nor an indication that it gave them pleasure that one in so important a position had been restored to the position of respect and confidence which his important office required.

On behalf of the defendants it can be said that they acted without malice in publishing extracts from the report of the select committee, and it was that report which brought the matter into the news, and that the judge has found that the reporter, the third defendant, "did not doubt Mr. Bromley's [a director of "the cemetery company] word in the least," and that he, the judge, had no doubt that "what the defendants reported was "what Bromley had in fact said, but there were many untrue "statements."

Against them is the absence of any apology until very belatedly when, of little avail, one was inserted by counsel in the defence, and this notwithstanding that the matter had been kept in the news in the "Daily Mail" in one way or another over a prolonged period beginning on May 17, 1958, until November 13, 1958, altogether on some 17 different dates with reference often on more pages than one.

But these and perhaps other matters of a minor character complained of by the plaintiff were for the judge, and this court would not intervene merely because it thought the amount low. For the reasons which I have stated, I would hold that the judge failed in the assessment of damages to take adequately into account the second part of the innuendo which alleged that the plaintiff had committed a criminal offence; that he concluded that the period of damage was much less than it was; and above all, that he assessed damages on the basis that the plaintiff had a bad reputation prior to the publication complained of by reason of the publicity given to the report. These are, in my opinion, vital matters. We were properly referred to what was said by Lord Wright in *Davies* v. *Powell Duffryn Associated Collieries Ltd.*,[14] and by Lord Simon in *Nance* v. *British Columbia Electric Railway Co. Ltd.*[15] on the direction by which an appellate court should be guided in reviewing damages.

If the damages were assessed on a wrong basis at least in part, as I, with every respect, have had to conclude, then there is no doubt that they call for reassessment. Damages in such a case as this are hard to assess. I should have thought a jury would have been, with their respective viewpoints, the right tribunal for the task. My two brethren have assessed the damages at £4,000, which I accept, although my own unaided assessment would have been somewhat higher, based perhaps on a view of the innuendo more favourable to the plaintiff's claim, but primarily on the injury done to one holding the high and important office of town clerk of a great city by the defendants' readiness to exploit the matter in the way they did, and then their unwillingness or at least failure to see and to redress the wrong they had done.

I would, therefore, allow the appeal and substitute a judgment for £4,000.

Holroyd Pearce L.J. Mr. Lawrence contends first that the judgment was wrong in holding that the second libel was not

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[14] [1942] A.C. 601; 58 T.L.R. 240; [1942] 1 All E.R. 657, H.L.

[15] [1951] A.C. 601; [1951] 2 T.L.R. 137; [1951] 2 All E.R. 448, P.C.

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defamatory. It is conceded that the question depends largely on first impression. I, too, share the judge's view of it.

Secondly, it is argued that the judge wrongly mitigated the damages by reason of injury to the plaintiff's reputation by the publication in the "Daily Mail" and in other newspapers of the report of the select committee.

The judge dealt with this question in the following passages. He said: "The defendants put in evidence more or less contemporaneous articles in other newspapers. Those have been read "and they are, I suppose, mainly relevant to the assessment of "damages and, indeed, they are important on one element of "the assessment of damages, as I will endeavour to explain "later." Then he said: "Finally, on the issue as to the assessment of damages, here again the report of the select committee "is an event which happened, and, in so far as the making of the "report and the printing of extracts from it in various newspapers "caused damage to the plaintiff's reputation, the defendants are "not responsible for that damage, and, again, any amount of "comment would have very little if any materiality." He continued: "How much damage is attributable to so much of the "libel as is neither privileged under the Act nor true? So far "as the article contained extracts from the select committee's "report, if they were doing that bona fide, without malice, that "is privileged and, in so far as what was said was true, that is, "of course, justified. One has to isolate the indefensible part of "the libel from the rest." Later he said: "As one expects, one "finds that this report of the select committee, which expressed "a strong view and strong disapproval of a local government "officer, received substantial publicity. That must have done "substantial damage to the plaintiff's reputation. For that "damage the defendants are not responsible, and the plaintiff "cannot recover for it, therefore, in this action." Then he said: "This very serious stigma had been cast on the plaintiff and "added a lot, in my view, to the damage flowing from the "original report of the committee. I would say that probably "the report of the committee, while it caused much damage— "there are various ways of putting it—one way of putting it is "that the article of June 16 put the meat on the bones, in this "way, that the committee merely reported that the shares were "acquired under value, but this article in the 'Daily Mail' added "the meat to it by saying that the true value was more than "twice what was offered." And finally he said: "As regards "the proper measure of damages, one has to remember that a "good deal of damage had already been done by the publication "of the report."

It is argued with force that the evidence of other newspapers which published the report was not admissible in mitigation of damages. They were only (and quite properly) put in evidence on the question of malice to show that the "Daily Mail" was not maliciously conducting an individual campaign. They could not properly be proved in mitigation of damages: see *Saunders* v. *Mills* [16] and *Hobbs* v. *Tinling*,[17] *per* Scrutton L.J.

If the judge's observations above mean that he was doing no more than isolating the publication of the report in the "Daily "Mail" and other newspapers from the actionable matter in respect of which he had had to give damages, and leaving the former out of account when he did so, he was admittedly dealing correctly with the matter. If, however, he was mitigating the damages on account of injury done to the plaintiff by the publication of the report he was not, in my judgment, entitled to do so.

In *Harrison* v. *Pearce*,[18] a case of libel, Martin B. said: "The plaintiff has a right to recover against this defendant "all the damage which the jury think arose from *his* "wrongful act." It is only in respect of the wrongful act that the damages are assessed. But the defendant in a libel action cannot rely on the argument that since others have thrown mud at the plaintiff he, the defendant, has caused very little harm by throwing some extra mud. The case of "*Truth*" (*N.Z.*) *Ltd.* v. *Holloway*,[19] to which my Lord has referred, makes this plain.

The fact that other persons on previous occasions have published the same libel has been held irrelevant: *Saunders* v. *Mills*.[20] Such evidence is inadmissible, even when coupled with evidence that the plaintiff took no steps to contradict the libel: *Pankhurst* v. *Hamilton*.[21] Nor can the existence of rumours corresponding to the libel be proved: see *per* Cave J. in *Scott* v. *Sampson*,[22] and the cases there cited. ". . . it would seem," said Cave J.,[23] "that on principle such evidence is not admissible, as only "indirectly tending to affect the plaintiff's reputation. If these "rumours and suspicions have, in fact, affected the plaintiff's

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[16] 6 Bing. 213.

[17] [1929] 2 K.B. 1, 18.

[18] (1858) 1 F. & F. 567, 569.

[19] [1960] 1 W.L.R. 997.

[20] 6 Bing. 213.

[21] (1887) 3 T.L.R. 500.

[22] 8 Q.B.D. 491.

[23] Ibid. 504.

"reputation, that may be proved by general evidence of reputation. If they have not affected it they are not relevant to the "issue . . . both the weight of authority and principle seem "against the admission of such evidence."

Cave J. goes on to make it plain that it is for injury to his reputation that a plaintiff obtains damages, and if his reputation is bad he recovers smaller damages since the injury is less. The judge does not specifically differentiate between reputations that are deservedly or undeservedly bad. He is dealing with the generality of cases where a man, as a rule, has approximately the reputation that he deserves. Nevertheless the general reasoning of the judgment makes it clear that it is reputation, not disposition, that is to be considered. He says[24]: "As to the third head "of evidence of facts and circumstances tending to show the "disposition of the plaintiff, both principle and authority seem "equally against its admission. At the most it tends to prove "not that the plaintiff has not, but that he ought not to have, "a good reputation, and to admit evidence of this kind is in "effect, as was said in *Jones* v. *Stevens*,[25] to throw upon the "plaintiff the difficulty of showing a uniform propriety of conduct "during his whole life. It would give rise to interminable issues "which would have but a very remote bearing on the question "in dispute, which is to what extent the reputation which he "actually possesses has been damaged by the defamatory matter "complained of." From that judgment it is plain that it is the evidence of the plaintiff's bad reputation and not the evidence of rumours or incidents that might make it bad which is admissible in mitigation.

That judgment has been uniformly treated as accurate in the Court of Appeal as well as in courts of first instance: see *Hobbs* v. *Tinling*[26] and *Speidel* v. *Plato Films Ltd.*[27] And it is not open to this court to take a different view.

Can it here be said that there was some evidence of the plaintiff's bad or partially bad reputation? In my judgment there was none. Evidence of bad reputation must be properly proved. It is a grave matter. One is not entitled to assume without evidence that the plaintiff's reputation must have changed in the four weeks following the publication of the report. As the months went by such report if uncontradicted would, no doubt, have its effect on his reputation, especially if it was succeeded by other similar matters; and the plaintiff's reputation might in due course become bad and be proved against him. No doubt the public unmasking of a villain or a conviction in a court of law will have a more immediate effect. But when the defendants' libel was published the plaintiff was a man of good reputation who had recently had something damaging attributed to him. A man's reputation in the sense in which the word is used in civil or criminal courts does not alter daily as good or bad deeds are ascribed to him. It is the judgment of his fellows on his general life over a period.

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[24] 8 Q.B.D. 491, 504, 505.

[25] (1822) 11 Price 235.

[26] [1929] 2 K.B. 1.

[27] [1960] 3 W.L.R. 391.

Any man is presumed on general principles to have a good reputation until the contrary is proved. Here the contrary was not proved and there is no evidence on which we should be entitled to say that the plaintiff had acquired a bad or partially bad reputation by the date of the libel.

In *Speidel's* case [28] there was a consideration of matters on which, under the machinery of litigation the defendants may lead evidence in mitigation. But a consideration of when and in what circumstances the defendants can introduce evidence to mitigate their damages is not to the point in the present case. The publication of the report was fairly and squarely before the court. The plaintiff presented the history of the facts to the judge and asked for damages for the wrong that the defendants had done him. That history included the publication of the report. But, nevertheless, the defendants are not thereby entitled to rely on that publication for the purpose of mitigating their damage. It is for such purposes irrelevant.

In my opinion the judge was influenced in some degree by a view that in comparison with the publicity given to the report the defendants did not add a great deal; and that the damages should be thereby diminished. As a result, he estimated the damages at a figure which I respectfully think was too low.

The plaintiff further complains that the judge wrongly failed to decide whether the innuendo in the first libel was made out. But, in my judgment, he was entitled to say, as he did: "The "broad effect of the libel . . . is that the plaintiff while he was in "negotiations with the directors of Ardwick Cemetery Ltd. went "behind the backs of the directors and sent a false or, at any rate, "misleading letter to the shareholders and thereby induced them "to part with their shares at a price which was less than their "true value, and perhaps it can be said also thereby implied that

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[28] [1960] 3 W.L.R. 391.

"there was an offence under section 12 which is so to speak the "serious section of the Prevention of Fraud (Investments) Act, "1939." When, as here, the words in their ordinary meaning are defamatory and unjustifiable, the question of whether the innuendo is made out is only relevant to damages. The imprecise finding of the judge on the question of the innuendo is adequate for that purpose and is probably truer than a more precise finding one way or the other would be. In general, the innuendo was not made out, but it might well be that to some of the readers the libel conveyed the effect pleaded in the innuendo.

Fourthly, the plaintiff argues that the judge in dealing with the part which the defendants sought to justify, wrongly severed the allegation that the parties were still in negotiation, holding that it had been justified, and failed sufficiently to take into account that the real gist of the libel, namely, all the rest of the libel dealing with the value of the shares and Bromley's various exaggerations and untruths had been the subject of an unsuccessful attempt to justify. In my judgment that point is not made out.

[His Lordship considered the judgment of Pearson J. in respect of the allegations that negotiations were still pending.] I find nothing of substance to criticise on this point, nothing that would justify any interference by this court.

Finally, Mr. Lawrence argues that the judge misapprehended the facts in holding that on July 2 there was "complete" or "ample" vindication and that, therefore, he had only to award substantial damages in respect of a period of a fortnight. I venture to think that the judge was not justified in considering the article of July 2 to be an "ample" or "complete" vindication. The article was headed "Town Clerk Cleared." And a perusal of the details showed that the plaintiff was cleared of the threat of prosecution under section 12. The article starts in heavy type—"There will be no Prosecution in the Case of the "Neglected Graveyard." There follows the fact of the Attorney-General's announcement; and the article sets out his statement to the effect that "there is no ground for concluding that the "letter contained any false misleading or deceptive statement or "that there was any dishonest concealment of material facts. "Consequently there are no grounds for a prosecution for an "offence against section 12 of the Act." The article also sets out the corporation's defence as given in their booklet. But the corporation were clearly concerned to put the best face on their town clerk's action on their behalf and their view could hardly be thought by readers to be impartial.

Therefore it is not correct to say that the plaintiff had been completely vindicated on July 2. He had been acquitted of dishonesty which would render him liable to prosecution, and it had been made clear that his own council were saying that their offer for the shares was generous. But readers were reminded in that same article that the Board of Trade alleged that the break-up value of the shares was greater than £1 each, and that "some "shareholders said later that the stock was worth more than £2." An important matter was left undecided, namely, whether he had without actual dishonesty succeeded in getting shares from the shareholders behind the chairman's back for a sum less than their true value. Such behaviour would be sharp practice. Though not unknown in some circles, it would be deplorable in a town clerk acting for a very large and important corporation.

That article of July 2 gave an opportunity for the "Daily "Mail," as the unbiased person who had put forward the accusations of the plaintiff's critics, to assess whether the defence put forward by the corporation in their booklet had been made out. It would have been easy (but perhaps distasteful) for the defendants to say that there was no sharp practice, that the accusations of the critics had all been successfully dispersed, that the figures put forward by them had been inaccurate, that the offer had been generous, and to add, for good measure, an apology to the plaintiff. But they did not do so, and thereby at their own risk they allowed a serious part of the damage they had done to continue. There has never been any apology for the untruths or any recantation of them. Indeed, the fact that the defendants attempted to justify them was the antithesis of recantation. The partial apology in a pleading which attempted to justify a large amount of defamatory untruths was no apology at all. It is inevitably, in such a context, mere faux bonhomie.

It is argued by the defendants that the error with regard to "complete" vindication is not a matter which would justify altering an assessment of damages which is compounded of so many factors of varying importance. But the question of vindication is a very important matter. It affects the plaintiff in the extent of his injury and the defendants in an assessment of their conduct. They were acquitted of malice; but, nevertheless, they should have taken all reasonable steps to counteract the damage that they had caused and to prevent it from continuing. No valid grounds are put forward for their failure to do so. As a result, the damage continued long after July 2. Not until the judge gave judgment was there any pronouncement by any impartial person that the plaintiff had not unworthily behind the directors' backs obtained the shares for less than their true value, but had in fact made "a generous offer to the shareholders which they "were very fortunate to get."

I agree with my Lord's judgment and I would, accordingly, substitute for the figure of £1,100 the figure of £4,000.

Devlin L.J. The main argument in this appeal has been devoted to Mr. Lawrence's submission that Pearson J. was wrong in taking into account the fact that the plaintiff's reputation would in any event have been injured by the report of the select committee (the publication of which by the "Daily Mail" was privileged and which did not therefore sound in damages), and by reason of this diminishing the damages which he would otherwise have awarded to the plaintiff. I think that the judge did diminish the damages on this ground and it does not appear that he was ever asked to do otherwise. Mr. Faulks has not contended that the point is not open to Mr. Lawrence; but the omission means that we have not got the benefit of the judge's conclusion on a difficult point.

The argument for limiting the damage can be put in two ways. First, it can be said that looking at the defamatory article by itself and without regard to what had gone before, it consisted of Bromley's story, much of which was indefensible, and for which the defendants have to pay, and of a statement from the select committee's report, which was defensible and for which, therefore, the defendants have not got to pay. The judge appears to be looking at the matter in this way where he says in his judgment: "How much damage is attributable to so much of the "libel as is neither privileged under the Act nor true? . . . One "has to isolate the indefensible part of the libel from the rest." On this view it is not a question of mitigating the damage but simply of ascertaining for how much of the damage done the defendants are responsible.

The other way is to treat the question as one of mitigation of damage and to assert, as the defendants do, that on the date when the libel was published the plaintiff already had a tarnished reputation which must be taken into account as diminishing the damages that would have been awarded if his reputation had been unblemished. Under the first head, the prior publication of the report is irrelevant, and can be conceded as inadmissible, under this head it is essential and involves going back to the date when the committee's report was first published, that is May 17, and relying upon the fact that it received widespread publicity not only in the "Daily Mail" but also in all the other national newspapers. The contents of the other national newspapers are summarised by the judge in his judgment. He concludes that the report of the committee received substantial publicity which must have done substantial damage to the plaintiff's reputation: "for "that damage the defendants are not responsible and the plain-"tiff cannot recover for it therefore in this action." He says the same thing again in his judgment; and in the paragraph in which he fixes the damages he begins: "As regards the proper measure "of damages, one has to remember that a good deal of damage "had already been done by the publication of the report." Mr. Lawrence says that he had to accept the other newspapers as admissible on the issue of malice because they were being properly used to show that the "Daily Mail" was not conducting a special campaign of its own against the plaintiff; but he disputes that they were admissible on the issue of damage.

Before considering separately these two limbs of the argument, it is convenient to refer to *Saunders* v. *Mills*,[29] because that was the authority on which Mr. Lawrence chiefly relied as supporting his argument as a whole. In this case, the plaintiff, as attorney, claimed damages for a libel published in a newspaper. At the trial the defendant tendered evidence that he had copied the libel in substance from "The Observer" newspaper and that many other journals had published the same statement. Tindal C.J. admitted "The Observer"[30] "as showing there was less of "malice than if the defendant had been the original composer," but declined to receive evidence of a similar publication having "been made in other newspapers." This ruling was upheld by the Court of Common Pleas in banc.[31]

Mr. Faulks has submitted that we should not approve *Saunders* v. *Mills*.[32] I think we ought to do so, not only because it is a decision of long standing, but because Parliament has treated it as being good law and has passed enactments which are insensible except upon the hypothesis that the principle on which it is based is part of the law of the land. I shall refer later in this judgment to the statutes of 1888 and 1952 which, subject to certain limitations, permit evidence to be given of other publications of the same libel.

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[29] 6 Bing. 213.

[30] Ibid. 220.

[31] Ibid. 220–224.

[32] 6 Bing. 213.

At first sight it looks as if *Saunders* v. *Mills* [32] introduced into the law of libel a sort of extension of the rule applicable to joint tortfeasors. Separate publications of the same libel are of course separate torts, but the principle in *Saunders* v. *Mills*,[32] it may be thought, is that, notwithstanding that they are separate torts, one defendant is liable for the whole of the damage flowing from the libel just as he would be if he were one of several participators in a joint tort.

But that is not, I think, the reasoning behind *Saunders* v. *Mills*,[32] nor its effect. In the first place, one publisher will not be liable for all the damage done by another. If a libel is published simultaneously in the national Press and in a parish magazine, the damages payable by the latter will not be assessed on the basis of the circulation of the former as it would in the case of a joint tort. This is shown by *Harrison* v. *Pearce*.[33] In this case a certain writer composed a statement defamatory of the plaintiff and had it published as a placard and also as an advertisement in the defendant's newspaper. The defendant contended that part of the plaintiff's damage was due to the publication in the placard for which the plaintiff was bringing another action. Martin B. said that the jury could not take into account the other action; the plaintiff had a right to recover against this defendant all the damage which the jury thought arose from *his* wrongful act. But he goes on to say that the jury is not to assume that all the damage necessarily arose from the defendant's publication.

The reasoning behind *Saunders* v. *Mills* [34] and *Harrison* v. *Pearce* [35] is, I think, simply that the damage done by other publications is deemed to be irrelevant. So in one sense it is. If each publisher is thought of as having his own circle of readers or listeners, he will be made responsible for the publication to them but not beyond, and it is irrelevant to say that some other publisher will be responsible for another publication of the same libel to another circle. But in defamation the damage goes beyond the harmful effect upon the minds of those who receive the publication at first hand. There has to be taken into account as well, for example, the element of mental distress which does not increase proportionately with the extent of the publication.

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[32] 6 Bing. 213.
[33] 1 F. & F. 567.
[34] 6 Bing. 213.
[35] 1 F. & F. 567.

More important, there is the slow spread of the libel beyond the immediate circle; and if eventually the whole public mind is permeated, no one can identify each separate source of infection. The damage due to mental distress and to widespread repetition constitute, it may be said, an indivisible injury for which the damages cannot be separately assessed as between different publications of the same libel, and therefore each wrongdoer whose act is a substantial cause of the injury must pay for the whole. " . . . each publisher is answerable for his act to the same extent " as if the calumny originated with him." This statement of the law in Gatley (4th ed., p. 106), has recently been approved in *Cadam* v. *Beaverbrook Newspapers Ltd.*[36] and in "*Truth*" *(N.Z.) Ltd.* v. *Holloway.*[37]

Thus, where a libel was published by several defendants, the common law permitted the plaintiff to recover damages several times over in respect of those elements of damage that were common to each libel. Each jury had to be directed to consider such elements as mental distress and the spread beyond the immediate circle as if the libel under consideration was the only one in the field. (Obviously, therefore, it would not be permissible mitigation of damage to say that some of the distress and some of the spread whose source could not be identified would or might be due to some other privileged publication.) The common law position has been partly alleviated by legislation which foreshadowed to a limited extent the solution that was later applied for joint torts in 1935 [Law Reform (Married Women and Tortfeasors) Act, 1935]. The Law of Libel Amendment Act, 1888, s. 5, provides that where actions are brought in respect to the same or substantially the same libel against two or more defendants, the actions may be consolidated and tried together and the damages given in respect of the libel apportioned between the defendants. By the Defamation Act, 1952, s. 12, enlarging the scope of a similar provision previously made in section 6 of the Act of 1888, the defendant is permitted to give in evidence in mitigation of damages that the plaintiff has recovered damages or brought actions for damages or received or agreed to receive compensation in respect of publications to the same effect as that sued upon. The distinction between this form of relief and that which is now granted to joint tortfeasors is that the joint tortfeasor has the right to initiate a claim for contribution while the

[36] [1959] 1 Q.B. 413, 422; [1959] 2 W.L.R. 324; [1959] 1 All E.R. 453, C.A.

[37] [1960] 1 W.L.R. 997, 1003.

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defendant under the Acts of 1888 and 1952 cannot get any relief at all unless the plaintiff chooses to sue more than one publisher.

I turn now to consider specifically the first limb of the argument, which I think really amounts to a contention that the damage done by the defamation ought to be notionally apportioned and that the defendants should pay only for so much of it as was caused by the unprotected part of the publication. In my judgment the fact that a passage in the defamatory article is protected by privilege is irrelevant in the assessment of damages in this case. The foundation for this conclusion is that the report and Bromley's story are as a piece of defamation essentially one and the same. The defamatory essence of them both is that the plaintiff was guilty of sharp practice. The story is worse than the report because it goes further, but in substance they contain the same libel.

Privilege attaches to form or occasion but not to substance. What a Member of Parliament says in the House of Commons is privileged; the repetition of the very same words outside is not. A report of a judicial or parliamentary proceeding may be privileged, but if the substance of the matter be cast into another form, the publication is subject to the ordinary law. The object of the privilege is so that the public can obtain a fair report of what is said and decided in Parliament and in courts of law; it is not to confer a licence on anyone to handle the subject-matter thereafter in whatever way he wishes.

If Bromley's story had been printed by itself (and I shall assume for this purpose that it goes no further than the report) it would be no answer to an action for libel to say that the same thing had already been said in the report any more than it would be an answer by a Member of Parliament who spoke slander at a public meeting to say that he had said or could say the same or worse with impunity in the House of Commons. If Bromley's story by itself is unprotected, it cannot alter or diminish the defendants' liability if they publish with it as part of the same article an extract from a protected report.

This conclusion appears to me to be in accordance with, and indeed to exemplify, a fundamental principle in the law of damage. Where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. As between the plaintiff and the defendant it is immaterial that there are others whose acts also have been a cause of the injury and it does not matter whether those others have or have not a good defence. These factors would be relevant in a claim between tortfeasors for contribution, but the plaintiff is not concerned with that; he can obtain judgment for total compensation from anyone whose act has been a cause of his injury. If there are more than one of such persons, it is immaterial to the plaintiff whether they are joint tortfeasors or not. If four men, acting severally and not in concert, strike the plaintiff one after another and as a result of his injuries he suffers shock and is detained in hospital and loses a month's wages, each wrongdoer is liable to compensate for the whole loss of earnings. If there were four distinct physical injuries, each man would be liable only for the consequences peculiar to the injury he inflicted, but in the example I have given the loss of earnings is one injury caused in part by all four defendants. It is essential for this purpose that the loss should be one and indivisible; whether it is so or not is a matter of fact and not a matter of law. If, for example, a ship is damaged in two separate collisions by two wrongdoers and consequently is in dry dock for a month for repairs and claims for loss of earnings, it is usually possible to say how many days' detention is attributable to the damage done by each collision and divide the loss of earnings accordingly.

These are elementary principles and readily recognisable as such in the law of damage for physical injury. It is not so easy to distinguish and apply them in the law of damage for loss of reputation. It may be easier to do so, I think, if one takes as an illustration separate publications to one man only and a piece of special damage flowing from them. If a master during the course of a morning hears the same slander about the plaintiff, his servant, from four different defendants, he may after he has heard them all decide that coming from four sources it must be true and he may dismiss the plaintiff in the afternoon. Subject to any defence he may have, each defendant is severally liable for the whole of the financial loss which the plaintiff suffers from the dismissal. If one defendant has no defence, it will not help him at all that the other three can make out a good case on the grounds of qualified privilege.

The same principle must apply to general damage for loss of reputation. If a man reads four newspapers at breakfast and reads substantially the same libel in each, liability does not depend on which paper he opens first. Perhaps one newspaper influences him more than another, but unless he can say he disregarded one altogether, then each is a substantial cause of the damage done to the plaintiff in his eyes. A fortiori, when a

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reader of the "Daily Mail" picked up the issue for June 16 and read the article complained of, it is not possible to say how much damage was done by the privileged extract from the report and how much by Bromley's story; all that can be said is that they combined to injure the plaintiff's reputation.

In the application of these general principles to damage done by a libel there are two qualifications to be borne in mind. Each of them is illustrated by an authority relied upon by Mr. Faulks. The first is that damage done by two distinct libels is separately measurable and it is immaterial that the two libels form part of the same publication. The second is that the damage done by the publication of a libel must be measured, albeit roughly, in accordance with the number of people to whom the publication is made. A man's reputation is in the keeping of others and it is by words uttered to those others that it is injured; the larger the number to whom the publication is made the greater the injury. If the libel is spread from mouth to mouth by a series of utterances, the damage done by each must be separately assessed; if the publication consists of only one utterance to a large number, there can be only one assessment but it must be made in accordance with size.

The first of these two points is illustrated by a dictum of Earl Loreburn in *Adam* v. *Ward*,[38] on which Mr. Faulks relied. His Lordship said[39]: "I will only add that when one part of a libel "is held to be protected by privilege and the other part not "protected the jury ought to be told that they cannot give "damages in respect of the first part at all, unless they are satis- "fied that it was malicious. . . ." It does not appear from the facts in this case that the libel was divisible and I think that his Lordship's observation must have been directed to an argument advanced by Sir John Simon in the following terms[40]: "A "case might conceivably arise in which a document contained "two subject-matters, both containing defamatory statements, "so wholly divorced from one another that the judge might rule "that the occasion was privileged as regards one subject-matter "but not as regards the other, but the point has never arisen for "decision, although it has been mooted in several cases. . . ."

When, as in this case, the libel is essentially one and the same, the position is illustrated by an old case. In *Lewis* v.

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[38] [1917] A.C. 309; 33 T.L.R. 277. H.L.

[39] [1917] A.C. 309, 321.

[40] Ibid. 316.

Clement[41] the plaintiff was an attorney who had brought proceedings in the Insolvent Debtors Court. In the course of the proceedings the judge[42] "deprecated in strong language the "conduct of plaintiff." The defendant's newspaper published the report of the proceedings under the heading "Shameful "conduct of an attorney." The plaintiff brought an action for libel against the defendant. Abbott C.J. held, delivering the judgment of the Court of King's Bench, that without deciding whether the report of the proceedings was privileged, the claim succeeded because the defendant had not confined himself to what actually passed in court but had prefaced the statement with the words "Shameful conduct of an attorney," and therefore taken upon himself to make that allegation concerning the plaintiff. The court awarded a writ of inquiry to assess the damages, and as a result of the inquiry judgment was entered for £500. The defendant brought a writ of error in respect of this assessment, and in 1822 the matter came before the Court of Exchequer Chamber, where it is reported under the heading of *Clement* v. *Lewis*.[43] The first argument advanced on behalf of the defendant was[44] "that the heading of the libel imputed "no misconduct beyond that which was developed in the ensuing "statement." The argument failed, the court on this point affirming the judgment of the court below.

The other point is illustrated by a dictum in *Chapman* v. *Lord Ellesmere*,[45] on which Mr. Faulks also relied. In this case the plaintiff, a horse trainer, sued in respect of the publication of a decision of the stewards of the Jockey Club which was a libel upon him. The plaintiff sued the stewards (and their agents, Messrs. Weatherby) and "The Times," the stewards in respect of three publications and "The Times" in respect of one. The first publication was the publication by the stewards of their decision to the press agencies on September 29; the second publication was that in "The Times" on September 30 and the stewards and "The Times" were alleged to be jointly liable for this; and the third publication was in the "Racing Calendar" on October 2 for which the stewards as proprietors of the "Racing "Calendar" were held to be responsible. The publication in the "Racing Calendar" was held to be privileged but that to the news agencies and in "The Times" was held not to be privileged. The Court of Appeal considered that the damages awarded in respect of the first and second publications were excessive and ordered a new trial. Lord Hanworth M.R. referred to the directions which should be given to the jury in the new trial and said[46]: "The jury should be directed that they cannot "impeach the decision which was reached that the publication "was in the ordinary course of the news agencies' and news- "papers' business; and was a matter which must in any case "have become known to a very large circle through the protected "publication of the Racing Calendar on October 2."

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[41] (1820) 3 B. & Ald. 702.

[42] Ibid. 703.

[43] (1822) 3 Brod. & Bing. 297, Ex.Ch.

[44] Ibid. 298.

[45] [1932] 2 K.B. 431.

This is in the nature of an obiter dictum, though one made by a careful and learned judge, because the point did not strictly arise at that stage and does not appear to have been argued. I think with great respect that it is incorrect in form. To admit evidence about the contents of the "Racing Calendar" would be contrary to what was decided in *Saunders* v. *Mills*,[47] an authority that was not considered or overruled; moreover, the "Racing Calendar" was published after "The Times." But I am far from saying that in substance the proposed direction would not be correct. Lord Hanworth must have meant that the damages should be reduced in consideration of the fact that a number of the readers of "The Times" would also be readers of the "Racing Calendar"; if so, they were persons to whom a protected publication could be made. The vehicle of publication, whether it is the "Racing Calendar" or "The Times," is immaterial. As I have said, the law requires and permits that damages should be measured by the extent of the publication. A jury can properly be directed to give less damages against a paper which has a circulation of 100 than against one that has a circulation of 1,000. It may be therefore that if a proportion of readers of "The Times" could properly have received the news anyway as a privileged communication to them, they can be counted out when the extent of the circulation is being considered. Whether this is so or not—and it is unnecessary for me to offer any firm opinion upon it—it raises a different point from the one which we have to consider in this case. In this case the privilege depends upon form, and if in amplification there is a loss of form, there is a total loss of privilege. There is no scope for a division into "privileged" and "unprivileged" readers.

Accordingly, the defendants are liable to pay for the whole of the damage to the plaintiff's reputation caused by the publication in the "Daily Mail"; and on that issue—I am still not considering the effect of antecedent damage to reputation—no evidence is admissible of other publications of the same libel whether privileged or not. The defendants are liable for what was said in Bromley's story, neither more nor less; since the story contains the whole libel, they must pay the whole damage that flows from it. The extent of the damage done is to be measured in accordance with the circulation that the "Daily "Mail" is presumed to have. The damage is limited to readers of the "Daily Mail" who received the libel direct from the defendants and to those others to whom those readers may be assumed in due course to pass it on. That is the extent of publication which has to be considered. The trial judge had evidence before him that the same libel reached a number of other readers by means of publication in other newspapers. That evidence he would be right to ignore; the defendants have not to pay for that; the damages assessed against any one national newspaper are to be assessed on the basis of its circulation and not on the basis of the circulation of all national newspapers combined. Mr. Faulks has submitted that this is all that the judge was doing—that he was taking note of the fact that the plaintiff's reputation had been injured by other publications and was saying that the defendants were not responsible for the total injury done by all the publications put together. I have set out the relevant extracts of the judgment. It is difficult to be sure of interpreting them accurately, since the point was never argued before the judge, but I think he is doing more than merely directing himself to ignore irrelevant evidence. I think he is assessing the defamatory excess in Bromley's story over and above the defamation in the report. If he is not doing that, then I think with respect the figure of £1,100 is inordinately low and ought to be altered.

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[46] [1932] 2 K.B. 431, 457.

[47] 6 Bing. 213.

All that I have said hitherto is based upon the supposition that the report and Bromley's story were published contemporaneously. They were published together in the article complained of and I have been dealing with the legal position on the supposition that that is the only publication that can be looked at. I must now turn to consider the second limb of the argument, that is, that at the time of the publication complained of the plaintiff already had a tarnished reputation because of the publicity given in the national Press, including the "Daily Mail," to the report of the select committee a month earlier.

Here again we are concerned with a fundamental principle of the law of damage which has to be applied with modifications to damage done by libel because injury to reputation is slippery to handle compared with bodily injury. In cases of bodily injury the principle is simply applied. Where there is not one indivisible injury but two separate injuries, the second wrongdoer—at any rate in cases where the legal consequences of the first injury are complete and ascertained before the second injury is done—is liable only for the excess of damage done by the second injury. That excess is not necessarily smaller than the damage done by the first injury. The earning capacity of a man who has lost an eye may be diminished by perhaps 10 per cent. If he loses his other eye, his earning capacity will probably disappear altogether. A defendant who is responsible for the loss of the second eye will have to pay for much more than half of the consequences of total blindness. In the example I have taken, he will have to pay for 90 per cent. of the loss of earnings; but he will not have to pay the full 100 per cent. because he can properly plead that the plaintiff's earning capacity was already damaged.

In a libel action the plaintiff is seeking to recover compensation for loss of reputation; and it is well established and in accordance with the general principle applicable to all torts that it is open to the defendant to show that, at the time when he inflicted his injury on the plaintiff's reputation, it was already damaged. There is nothing in *Saunders* v. *Mills*[48] to dispute this; there is indeed nothing to show that the other publications in that case were not contemporary. In cases of defamation evidence of previous bad reputation is usually considered as evidence in mitigation of damage, whereas in cases of bodily injury the same effect is obtained simply by measuring the consequences of the second injury. But, as Mr. Faulks submits, the principle in both cases is the same. In each case you have to take, as you find it at the time when the second injury was done, the state of the plaintiff's bodily fitness or the state of his reputation, as the case may be.

The modern law on mitigation of damage of libel is contained in the judgment of Cave J. in *Scott* v. *Sampson*.[49] Much of that judgment was approved in *Hobbs* v. *Tinling*,[50] particularly by Scrutton L.J., and the case itself was recently followed in this court in *Speidel* v. *Plato Films Ltd.*[51] In the latter case

[48] 6 Bing. 213.

[49] 8 Q.B.D. 491.

[50] [1929] 2 K.B. 1.

[51] [1960] 3 W.L.R. 391.

my recollection is that *Scott* v. *Sampson* [52] was accepted as good law. In the present case Mr. Hodgson for the defendants has argued that we ought not to approve the whole of Cave J.'s judgment in *Scott* v. *Sampson*,[52] and in particular that we ought not to hold that " character " for the purpose of mitigation of damage in the law of libel means reputation and not quality or disposition.

In view of this submission I have carefully considered the judgment of Cave J. and have looked at a number of the authorities which he cites. They are, as he says, conflicting; his judgment settled a number of disputed points in a way which seems to me to be full of good sense and that has stood unchallenged for nearly 80 years. In my opinion we should not depart from it now. I refrain from elaborating this because the judgment in *Speidel* v. *Plato Films Ltd.*[53] is at present being considered in the House of Lords; their Lordships will doubtless express their view of *Scott* v. *Sampson*,[54] and thereafter no opinion of mine will be of any value. Moreover, the proposition that " character " means reputation and not quality or disposition does not depend solely upon the authority of *Scott* v. *Sampson* [54] and is not peculiar to the law of libel; it applies throughout the civil and criminal law when the character of a witness or prisoner is in issue: see *Reg.* v. *Rowton*,[55] *per* Cockburn C.J., and *Rex* v. *Gunewardene*,[56] *per* Lord Goddard C.J.

The rule is therefore that evidence of character in mitigation of damage for defamation must be evidence of general reputation only. But in the application of this rule it is necessary to consider just what is meant by " character " in the sense of reputation. Leaving aside for the moment all questions as to the form of proof of bad character, it may be thought that the plaintiff in this case is in a dilemma. How can he say that Bromley's story gravely injured his reputation if in the same breath he asserts that the weightier censure by the committee did him no harm? A closer understanding of what is meant by " character " in this branch of the law will help to show whether the dilemma is more than superficial.

I desire to adopt a definition or description of " character " which was given by Mr. Erskine in the course of his submission in *Rex* v. *Hardy*,[57] and which has since been cited in argument in *Reg.* v. *Rowton*[58] and in *Rex* v. *Gunewardene*.[59] In the course of his submission he reviewed many earlier authorities and gave some interesting illustrations of the way in which questions designed to obtain evidence about reputation should properly be put; and he said[60]: "Character is the slow-spreading "influence of opinion, arising from the deportment of a man in "society; as a man's deportment, good or bad, necessarily pro- "duces one circle without another, and so extends itself till it "unites in one general opinion, that general opinion is allowed "to be given in evidence."

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[52] 8 Q.B.D. 491.

[53] [1960] 3 W.L.R. 391.

[54] 8 Q.B.D. 491.

[55] (1865) 34 L.J.M.C. 57, 60, 62.

[56] [1951] 2 K.B. 600, 606; [1951] 2 T.L.R. 315; [1951] 2 All E.R. 290, C.C.A.

[57] (1794) 24 Howell's State Tr. 199.

In my opinion it is only a settled bad character of this sort that ought to be taken into account in mitigation of damage. Where it exists, it shows that the permanent injury to a man's character done by a libel upon him is less grave than it would otherwise have been. There are other elements besides permanent injury to character to be taken into account in the assessment of damages for defamation. There is mental distress, the pain caused by those who doubt, even if they hold final judgment in suspense, and maybe financial loss also if they hold business in suspense as well. There is the malice of the defendant if it is proved; the presence or absence of an apology and his conduct and that of his counsel before and during the trial. If the innocence of a plaintiff was after a short period conclusively established, if the defendant was held up to universal execration so that it could be said that there was no possibility of anyone ever thereafter believing his falsehoods, still the plaintiff might obtain a verdict for heavy damages. Now, it cannot be said that in these respects a man with a bad character will necessarily suffer less. If he is a hardened sinner, he may not be much distressed and may not care about the doubts of others. But if he is a good man who has fallen once he may suffer all the more because of it. His distress will be the greater because he knows himself to be more vulnerable; the doubts about him will be more easily aroused and less easily borne than by a man who has had hitherto an unsullied reputation. Whether he be a hardened sinner or not, there is no reason why his defamers should pay a penny the less for their malice or misconduct. It is only really when one comes to consider permanent injury to reputation that it can be said that less is taken from a man who has already lost a part than from one who has preserved the whole. Thus it is fair and right that it is only when a man's bad reputation has formed and settled that it should be used against him.

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[58] 34 L.J.M.C. 57, 58.

[59] [1951] 2 K.B. 600, 604.

[60] 24 Howell's State Tr. 199, 1079.

So treated, the rule covering mitigation of damage in libel does not differ materially from that applicable in the ordinary law of tort. If a man is injured a second time while he is still recovering from his first injury and before the effect of that injury on his earning capacity can properly be ascertained, the second wrongdoer will be liable for the whole loss of earning capacity partly caused by his act. Just as in physical injury it takes time to ascertain what the degree of disablement will be, so the state of a man's reputation cannot fairly be assessed the moment after a slander is spoken. There can of course be cases when a man's reputation is ruined overnight just as he may be clearly disabled by a single blow. If, for example, a man pleads guilty to a charge of dishonesty, there is not much room left for question. But otherwise the loss of reputation is a slow process. Men wonder, doubt, ask questions, say at first they really do not know where the truth lies; and it is only when the dust has settled that the extent of the damage is revealed.

If the rule as to mitigation of damage is applied in this way, injury done to reputation by tales, true or untrue, will be ignored until, in Mr. Erskine's words, they have united to produce one general opinion, and then that general opinion will be allowed in evidence. This interpretation of the rule meets many of the objections that can be urged, and have been urged on behalf of the plaintiff in this case, against this form of mitigation of damage. Time is given for unfounded rumour and unjust accusation to be dispelled; they cannot at once be seized upon in diminution of damage. The danger of injustice inherent in the rule that a man's character depends upon what others believe about him and not upon his true disposition is much lessened; a false accusation can easily be made and may temporarily prevail, but it is not often that a man's settled reputation is founded upon untruth. Under this rule there is no danger of tomorrow's newspaper saying what it likes in the expectation that yesterday's will have to pay most of the bill. There is no danger that what is said in the House of Commons on one day can be repeated the next day with comparative impunity outside the House. It is indeed highly unlikely that an earlier publication of the same libel can be used to diminish the damage for a repetition of it; it is not impossible, for the libel may be an old one that has come to be generally believed.

Accordingly, I come to the conclusion that what is relevant when character is in issue, whether in a criminal or a civil case, is established reputation. Mr. Lawrence has submitted that there is no admissible evidence in this case to show that at the time of the libel the plaintiff's reputation had been damaged in this sense, so I turn to consider the way in which established reputation should be proved. Customarily the evidence is that of men who live in the community where the plaintiff is known and in which the libel has circulated and who have heard the plaintiff discussed. But I do not think that an inference from facts can or should be excluded. If it can be proved that a man has been convicted of theft and that that fact has received wide publicity, I think it can be inferred that his reputation for honesty has suffered. There may be exceptional cases in which such an inference could be rebutted, but it is at least a prima facie inference. It is unnecessary to call a witness to give formal proof of what must be obvious; but when the inference is at all doubtful, it is important that it should be put to the test of what the neighbours actually think.

It is common practice in criminal cases to accept proof of convictions without more as evidence of bad character. The point does not appear to have been much discussed in relation to libel, but Mr. Faulks has found one case which supports his submission that the court can act on inference. In *Hawkins* v. *Express Dairy Co. Ltd.*[61] Stable J. reduced to a farthing the damages of £750 which he would otherwise have given to the plaintiff for a libel on his honesty, because the plaintiff in his evidence-in-chief volunteered the information that he was guilty of a systematic deception known to the men among whom he worked. Stable J. said[62]: "The plaintiff has said that in this yard, among "his associates even up to the area manager, everyone knew that "he was pursuing this dishonest practice. . . . It seems to me "that I am not only entitled, but bound, to consider the reputa-"tion which has been injured." I think that Stable J. was entitled in principle (I do not, of course, concern myself with the correctness of the inference) to act upon an inference that in the circles where the libel was effective the plaintiff had already lost his reputation.

Finally, I must consider what has been put forward by the defendants as evidence of bad character. They called no witnesses to give direct evidence of it. They put some questions in

[61] 163 L.T. 147.

[62] Ibid. 149.

cross-examination to the plaintiff about the effect of the other newspapers which carried the report of the select committee, but (even if it be conceded, which I doubt, that a man is competent to give evidence about the esteem in which he is held by others) they got no answers from him which could amount to a concession that already within the month his established reputation had been permanently injured. There is left the inference to be drawn from the admitted facts; and this was the strongest way in which Mr. Faulks put his case. For this purpose he was willing that the contents of all newspapers other than the "Daily "Mail" itself should be excluded from consideration. He relied solely on the fact that the plaintiff put in as part of his case the article in the "Daily Mail" of May 16 which published the report of the select committee, and he invited us to infer, which I do, that the report would also have been given wide publicity in other papers. This publicity, he contended, must have injured the plaintiff's reputation.

I agree that the publicity must have caused the plaintiff immediate serious injury, but I am not prepared to infer that within a month his established reputation was lowered. I agree that a finding by a select committee must carry very great weight with the ordinary man and that some might have thought it conclusive and felt that they wanted to hear no more. But the proceedings before the committee are not like those at a trial where the whole matter is thrashed out in public and the whole story is known. There may well have been influential people in Manchester putting about another point of view. Many members of the corporation may have known the truth. Professional men who had advised the shareholders to accept the offer may well have known something of the true value of the shares. Many men might have preferred to wait until they heard the town clerk's side of the question before passing judgment. In my opinion this is not a case in which in the absence of direct evidence it would be safe to draw the inference that in a short period of a month and while the whole affair was still being agitated the plaintiff's character in the estimation of his fellow-citizens had been changed.

For these reasons I think that the judge was wrong in taking into consideration in mitigation of damage the publication, whether in the "Daily Mail" or elsewhere, of the report of the select committee. It follows that we must ourselves assess the proper figure to award to the plaintiff. For this purpose we have

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had to consider other criticisms that were made of the summing-up. I agree broadly with the views on these matters expressed by Sellers and Pearce L.JJ. and I do not think that it is necessary for me to deal with each criticism in my own words. I think that the figure of £4,000 is fair compensation for the damage sustained by the plaintiff; I agree that this figure should be substituted in the judgment for the figure awarded by Pearson J., and that to that extent the appeal should be allowed.

Appeal allowed, with costs.
Leave to appeal to House of Lords.

Solicitors: *Stephenson, Harwood & Tatham for Grundy, Kershaw, Farrar & Co., Manchester; Swepstone, Walsh & Son.*

I. G. R. M.

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Upjohn and Donovan L.JJ.

J. COOKE & SONS LTD. (TRADING AS DRAGES) v. BINDING.

[Plaint No. P.O. 7045.]

Debt—Committal order—Jurisdiction to vary—Non-payment of judgment debt—Committal order suspended on payment of monthly sum—Application to increase monthly sum—County court judge's jurisdiction—Debtors Act, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 5.

On a defendant's failure to pay any instalments of a judgment debt, the plaintiffs, the judgment creditors, applied to the county court judge for a committal order under section 5 of the Debtors Act, 1869.[1] The judge committed the defendant to prison but

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[1] Debtors Act, 1869, s. 5: "... "any court may commit to prison for "a term not exceeding six weeks, or "until payment of the sum due, any "person who makes default in pay- "ment of any debt or instalment of "any debt due from him in pursuance "of any order or judgment of that or "any other competent court: pro- "vided—(1) that the jurisdiction by "this section given of committing a "person to prison shall . . . (c) Be "exercised only as respects a judg- "ment of a county court by a county "court judge or his deputy. (2) That "such jurisdiction shall only be "exercised where it is proved to the "satisfaction of the court that the "person making default either has or "has had since the date of the order or "judgment the means to pay the sum "in respect of which he has made "default, and has refused or "neglected, or refuses or neglects, to "pay the same. Proof of the means "of the person making default may "be given in such manner as the "court thinks just; and for the pur- "poses of such proof the debtor and "any witnesses may be summoned

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suspended the order on payment of 10s. a month, since when the defendant had paid the amount ordered. Later, the plaintiffs learned that the defendant's wages enabled him to pay more than 10s. a month and they applied to increase the amount of the instalments. The county court judge held that he had no jurisdiction to increase the amount payable under the suspended committal order, but that if he had, he would have increased it to 25s. a month. The plaintiffs appealed:—

Held, that there was jurisdiction under section 5 of the Debtors Act, 1869, to vary the amount payable under a suspended committal order on evidence justifying such alteration and, accordingly, the amount would be increased to 25s. a month.

Wiltshire v. *Fell* [1960] 1 Q.B. 181; [1959] 3 W.L.R. 984; [1959] 3 All E.R. 862, C.A. considered.

Per Donovan L.J. The county court judge had jurisdiction, not only under section 5 of the Act of 1869, but also under rules 18 and 19 of Order 24 of the County Court Rules, 1936, to vary the amount due under the committal order.

APPEAL from Judge Nicklin sitting at Birmingham County Court.

The plaintiffs, J. Cooke & Sons Ltd., trading as Drages, obtained a judgment against the defendants, Frances Lucy Binding and her husband, Robert Gordon Binding, on June 23, 1959, for £58 10s. which was ordered to be discharged at £5 a month. The second defendant failed to pay any instalments. When three instalments were in arrear, the plaintiffs applied for his committal under section 5 of the Debtors Act, 1869. On December 8, 1959, the county court judge made an order committing the second defendant to prison for 10 days but suspended the order on payment of 10s. a month on the ground that the second defendant's means did not enable him to pay any more. The second defendant had paid and was continuing to pay 10s. a month but the plaintiffs had obtained a certificate from the second defendant's employers stating that his average wage was £15 a week. Accordingly, they applied to the county court judge to increase the instalments due under the suspended committal order to £2 a month.

The county court judge held that he had no jurisdiction to vary the amount due under the suspended committal order but indicated that if he had had jurisdiction he would have increased the amount to 25s. a month. The plaintiffs appealed.

"and examined on oath, according to "the prescribed rules. . . . For the "purposes of this section any court "may direct any debt due from any "person in pursuance of any order or "judgment of that or any other "competent court to be paid by instal-"ments, and may from time to time "rescind or vary such order. . . ."

The defendants, by a letter written to the plaintiffs' solicitors, said that they would not appear at the hearing of the appeal, as the second defendant was agreeable to paying 25s. a month.

W. A. Macpherson for the plaintiffs, the judgment creditors. Although it is conceded that a judge cannot revoke or vary a committal order, he must have jurisdiction under the proviso to section 5 of the Debtors Act, 1869, to vary the amounts of the instalments due under the terms of the order suspending the committal. *Wiltshire* v. *Fell* [2] clearly contemplates the variation of the instalments, although that case rightly decided that the committal order could not be revoked. The suspension order is the same as an instalment order: *In re a Judgment Debtor.*[3] As it is an instalment order, the county court judge must have power to vary the amounts payable under the County Court Rules, 1936, Ord. 24, rr. 18 and 19. [Reference was also made to the County Court Rules, 1936, Ord. 25, rr. 45, 54, and the notes thereto, and r. 55.]

Upjohn L.J. This appeal raises a short point, but a point of some general importance, as to the jurisdiction of a county court judge to vary the periodical instalments ordered to be paid as a term of the suspension of a committal order.

The facts may be shortly stated. The plaintiffs obtained a judgment against both defendants on June 23, 1959, for £58 10s., which was ordered to be discharged at £5 a month, the judge exercising the powers conferred upon him by section 99 of the County Courts Act. The second defendant—and we are concerned solely with the second defendant—failed to pay any instalments. When three instalments were in arrear the judgment creditor made application for his committal under section 5 of the Debtors Act, 1869, and on December 8, 1959, the judge made a committal order committing him to prison for 10 days, which was to be suspended on payment of 10s. a month. He did so on the ground that he thought that the second defendant's present means would not enable him to pay more. The second defendant has in fact continued to pay the amount ordered of 10s. a month, but the plaintiffs had recently come into possession of information which emboldened them to think that he was capable of paying a much larger sum, because they were able to prove, from a certificate of the second defendant's employers, that he was earning an average of £15 a week. So they applied to the county court judge to increase the instalments due under the suspended committal order to a sum of £2 a month.

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[2] [1960] 1 Q.B. 181; [1959] 3 W.L.R. 984; [1959] 3 All E.R. 862, C.A.

[3] [1935] W.N. 128; 51 T.L.R. 524.

When the matter came before the judge he indicated that had he thought that he had jurisdiction to do so he would have increased the amount payable under the suspended committal order to 25s. a month.

Parenthetically I may observe here that the second defendant was quite content with that, because we have before us a letter from him to the plaintiffs' solicitors saying that he did not propose to appear on this appeal as he was agreeable to pay the sum of 25s. a month.

The county court judge came to the conclusion, however, that he had no jurisdiction to increase or reduce the instalments payable under a committal order. In that I venture to think that the county court judge was in error. He appears to have thought that he was precluded from varying the order by a judgment of this court in *Wiltshire* v. *Fell.*[1]

It is unnecessary for me to read section 5 of the Debtors Act, 1869, in full, for it is very well known. I need only read the proviso to section 5, which says: "For the purposes of this "section any court may direct any debt due from any person in "pursuance of any order or judgment of that or any other com-"petent court to be paid by instalments, and may from time to "time rescind or vary such order."

The true ambit of the section was discussed in *Wiltshire* v. *Fell,*[2] which I have just mentioned. The headnote reads as follows[3]: "A county court judge who has made an order of "committal for debt under section 5 of the Debtors Act, 1869, is "functus officio and cannot revoke the committal order." Therefore the actual decision in that case is not in point here, because neither party is asking for revocation of the committal order.

Hodson L.J. said[4]: ". . . the position is that the Act having "given no power to revoke a committal order, the committal "order which has been made must stand and can only be revoked "upon appeal. That does not, in any way, take away from the "judge the power to vary the effect of the order or to suspend "its operation or in any way to remove his control of the case.

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[1] [1960] 1 Q.B. 181; [1959] 3 W.L.R. 984; [1959] 3 All E.R. 862, C.A.

[2] Ibid.

[3] [1959] 3 All E.R. 862.

[4] [1960] 1 Q.B. 181, 185.

"The difficulty the creditor is in, if the order is revoked, is that "he cannot, in the future, obtain any further sanction in respect "of the amount which was involved in the order of January 19, "1959. For these reasons, the appeal must be allowed, and the "order of the judge must be varied in so far as he has purported "to revoke the order for commitment. He did, in fact, having "revoked the order for commitment, make a different instalment "order, which, at the rate of 5s. a week, would, I suppose, "operate as a term of the suspension of the committal until the "matter is further reviewed by him. All that this court is doing, "and all that it is asked to do, is to reverse the judge's revocation "of the committal order itself."

So that Hodson L.J. was very careful to confine that decision to a question of revoking the committal order itself, and it is interesting to observe that he stated that the term of suspension, until the matter was further reviewed by the judge, would be at the rate of 5s. a week, whereas until the purported revocation of the order it seems that the amount ordered to be paid as a term of the suspension was 2s. 6d. a week. So that the court in that case found no difficulty in doing what the plaintiffs are seeking to do in this case.

With all respect to the county court judge it seems to me quite plain that there is ample jurisdiction contained in the proviso to section 5 of the Debtors Act, 1869, which I have read, to vary the amount payable under the order of suspension according to the circumstances that from time to time exist. Thus, if the judgment debtor can show that since the order was made his means have greatly decreased the court has power to reduce the instalments ordered to be paid as a condition of the suspension; and although I, myself, do not have in mind any particular case, I am sure I have done that on many occasions when hearing judgment summonses in Bankruptcy. Per contra, if the judgment creditor can establish that the means of the judgment debtor were greater than he was able to prove at the former hearing, or that those means have increased since the date of the order, there is ample jurisdiction to enable the court on the application of the judgment creditor to fix a greater sum to be paid by instalments as a term of the continued suspension of the committal order.

In this case it seems to me, with all respect to the judge, that there was ample jurisdiction for him, being satisfied as to the proper sum, to substitute the sum of 25s. a month in lieu of 10s. a month.

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Upjohn L.J.

One of the objections of the county court judge, in a very careful note which he has written for the benefit of the court, was that if it were possible for a judgment creditor or debtor to come again and again before the court it would mean, to quote his words, "To grant applications such as the present ones would "mean that all committal orders would be subject to review on "application by either the creditor or the debtor as often as "either so desires. In this court, where any of three judges "might have made the original order, it would virtually intro-"duce a method of successive appeals from any order which "ceased to satisfy either party."

I cannot accept that view. Of course, it is open to either party to make further applications to vary the amount ordered to be paid as a term of the suspension, but it is quite clear that if subsequent applications are made without having some new evidence to justify an alteration of the order formerly made, the application would, no doubt, be doomed to failure, and the applicant would be mulcted in costs.

I think that the jurisdiction in this case is plain and I would allow the appeal.

Donovan L.J. I agree. I think that the jurisdiction which the county court judge thought he lacked is to be found not only in the proviso to section 5 of the Debtors Act, 1869, but also in rules 18 and 19 of Order 24 of the County Court Rules, 1936.

Appeal allowed.

Solicitors: *Stafford Clark & Co. for Faber & Co., Birmingham.*

C. J. E.

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Lord Parker C.J., Hilbery, Gorman, Salmon and Stevenson JJ.

Road Traffic—Dangerous driving—Mechanical defect—Whether a defence—Burden of proof—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 11 (1).

Burden of proof—Criminal case—Dangerous driving—Defence of mechanical defect—Direction to jury.

A mechanical defect in a motor-vehicle may be a defence to a charge of dangerous driving under section 11 of the Road Traffic Act, 1930, if it causes a sudden total loss of control and is in no way due to any fault on the part of the driver, but such defence has no application where the defect is known to the driver or should have been discovered by him had he exercised reasonable prudence.

The onus of establishing such a defence does not rest on the accused; it will not be considered by the court unless raised by the accused, but once raised, it must be considered with the rest of the evidence and the onus of proof still remains on the prosecution.

Where, therefore, a driver, who knew that his car had a tendency to pull to its off-side when the brakes were applied, alleged, as a defence to a charge of dangerous driving, that a vigorous application of brakes pulled his car onto the wrong side of the road causing it to collide with an oncoming vehicle:—

Held, that it was dangerous for the driver to have driven his car with the knowledge which he possessed and that therefore his defence to the charge of dangerous driving was not made out and he was rightly convicted.

Hill v. *Baxter* [1958] 1 Q.B. 277; [1958] 2 W.L.R. 76; [1958] 1 All E.R. 193, D.C., and dicta of Lord Goddard C.J. in *Simpson* v. *Peat* [1952] 2 Q.B. 24, 27, 28; [1952] 1 T.L.R. 469; [1952] 1 All E.R. 447, D.C. considered.

Appeals against conviction and sentence.

The appellant, Frederick Albert Spurge, was convicted at Hampshire Quarter Sessions (Deputy Chairman A. Phillips Esq., O.B.E.) on September 27, 1960, of driving a motor-vehicle in a manner dangerous to the public contrary to section 11 (1) of the Road Traffic Act, 1930,[1] and was fined £50 and disqualified from driving for 12 months.

On May 14, 1960, the appellant was driving a Ferrari sports car round a sharp, dangerous left-hand bend, when his car went over the double white lines in the middle of the road and collided with an oncoming motor-scooter. The appellant was charged with dangerous driving.

At the hearing before quarter sessions, the case for the prosecution was that the appellant was attempting to negotiate the bend much too fast. The case for the appellant was that he approached the bend at about 30 miles an hour. On being warned of its dangerous nature he changed down and applied the brakes somewhat vigorously, which nearly wrenched the steering wheel out of his hands and pulled the car on to the wrong side of the road out of the appellant's control. Expert evidence was given that the brakes were in very bad condition and, if applied vigorously at 30 miles an hour, pulled the car fairly violently to its off-side. The appellant had taken delivery of the car a few days before the accident, having been told that the brakes had been overhauled, but on his homeward journey, a distance of about 20 miles, he noticed that the brakes had a slight tendency to pull the car to its right.

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[1] Road Traffic Act, 1930, s. 11 (1): "If any person drives a motor vehicle "on a road recklessly, or at a speed "or in a manner which is dangerous "to the public, having regard to all "the circumstances of the case, "including the nature, condition, and "use of the road, and the amount of "traffic which is actually at the time, "or which might reasonably be "expected to be, on the road" he commits an offence.

The appellant contended that he was not guilty of dangerous driving because the danger created by his motor-car, when it careered across the road and collided with the oncoming motor-scooter, was due solely to the defect in its brakes and was in no way attributable to the manner in which he was driving.

The appellant was convicted. He appealed against his conviction and sentence by leave of the court.

The facts are more fully set out in the judgment of the court.

A. K. Twaddle for the appellant. The deputy chairman failed to explain to the jury how far in law a mechanical defect was a defence to the charge. On the question whether such a defect can be a defence to a charge of dangerous driving, it is submitted that before the offence is committed there must be some positive culpable act on the driver's part. Although mens rea is not a necessary ingredient of the offence, it is not sufficient, in order to prove the offence, to show that the appellant's car crossed the double white lines and caused a danger to the public. The question is whether the appellant drove across the white lines or whether the car crossed them without his being able to do anything to prevent it: see the examples in *Hill* v. *Baxter*.[2] There is no authority on whether a mechanical defect is a defence to a charge of dangerous driving. Something more than civil negligence is required to convict a driver of dangerous driving: *Rex* v. *Furlong*.[3] As the appellant was not negligent he was not guilty of dangerous driving. [Reference was made to *Rex* v. *Harrison*,[4] *Simpson* v. *Peat*,[5] *Rex* v. *Howell*[6] and *Kingman* v. *Seager*.[7]]

If it be correct that defective brakes are a defence to dangerous driving, then, once the defence is raised, the burden of proof is on the prosecution to show that it was the driving and not the mechanical defect which was responsible for the dangerous movement of the car. The jury were not properly directed as to the law relating to mechanical defect or the burden of proof and were left to decide whether the appellant's explanation excused him.

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[2] [1958] 1 Q.B. 277, 283; [1958] 2 W.L.R. 76; [1958] 1 All E.R. 193, D.C.

[3] (1947) 90 Can.C.C. 197.

[4] (1948) 92 Can.C.C. 286.

[5] [1952] 2 Q.B. 24; [1952] 1 T.L.R. 469; [1952] 1 All E.R. 447, D.C.

[6] (1938) 27 Cr.App.R. 5, C.C.A.

[7] [1938] 1 K.B. 397; sub nom. *Kingham* v. *Seager*, 54 T.L.R. 50, D.C.

[Reference was made to *Rex* v. *Abramovitch* [8] and *Reg.* v. *Murtagh and Kennedy*.[9]]

Martin Tucker (for *Robert Hughes*) for the Crown. On the wording of section 11 of the Road Traffic Act, 1930, a latent mechanical defect is not necessarily a defence to a charge of dangerous driving. Conduct similar to civil negligence may be relevant to a charge of reckless driving under section 12 but cannot apply to a case where the offence is created by driving in a manner "dangerous to the public." It is conceded that there may be cases in which one can say that the man at the wheel is not driving at all: see the examples in *Hill* v. *Baxter*,[10] all of which refer to the condition of the driver. But the case of a latent mechanical defect is different because the driver is still driving and still doing something, however little. Even if the car is completely out of control, the driver is still driving in a manner dangerous to the public. The manner in which the driver is deprived of control is relevant having regard to the wording of section 11; if it is by personal incapacity, then he cannot be said to be driving; if it is by mechanical defect, he is driving.

On the question of onus of proof, it is for the appellant to satisfy the jury on the balance of probabilities that it was the mechanical defect which caused the danger. He is in the same position as a defendant who raises a plea of insanity as a defence. Although *Woolmington* v. *Director of Public Prosecutions* [11] put the burden of proof on the prosecution in most criminal cases, in the present case the onus must be on the appellant; the defence of mechanical defect was not raised until he gave evidence. The condition of the brakes and the effect of using them were matters within his knowledge and the onus was on him to show that the defect caused the accident and not the dangerous driving. [Reference was made to the observations of Lord Goddard C.J. in *Hill* v. *Baxter* [12] and to *Harding* v. *Price*.[13]]

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[8] (1912) 7 Cr.App.R. 145, C.C.A.

[9] (1955) 39 Cr.App.R. 72, C.C.A.

[10] [1958] 1 Q.B. 277, 283.

[11] [1935] A.C. 462; 51 T.L.R. 446, H.L.

[12] [1958] 1 Q.B. 277, 282.

[13] [1948] 1 K.B. 695; 64 T.L.R. 110; [1948] 1 All E.R. 283, D.C.

Twaddle in reply. The only exceptions to the rule in *Woolmington's* case [14] are insanity and express statutory exceptions. It is contrary to justice to expect a defendant to prove any excuse consistent with his innocence. Where a defence of accident is raised, it is for the prosecution to prove that it was not an accident. Similarly, where the defence of lawful possession is raised in a receiving case, the burden remains on the prosecution.

Cur. adv. vult.

May 18. LORD PARKER C.J. Salmon J. will deliver the judgment of the court.

SALMON J. The facts of the case lie within a short compass. On May 14, 1960, the appellant was driving a Ferrari sports car on a road between Havant and Hayling Island. As he was travelling round a very sharp and dangerous left-hand bend, his motor-car went over the double white lines in the middle of the road on to his wrong side of the road and there collided with an oncoming Lambretta motor-scooter.

Evidence was called on behalf of the prosecution to the effect that the appellant was attempting to negotiate the bend very much too fast. The case for the appellant was that he approached the bend at about 30 miles an hour and that on being warned by his passenger of its dangerous nature, he decided to go round the bend at a snail's pace; accordingly he changed down from third to second gear and applied his brakes somewhat vigorously. This application of the brakes nearly wrenched the steering wheel out of his hands and pulled the car on to its wrong side of the road in such a fashion that it was impossible for him to control it. It is to be observed that in his statement made to the police immediately after the accident, the appellant did not mention this loss of control and, indeed, denied that his motor-car had crossed the white lines in the middle of the road. Two expert witnesses were called on behalf of the appellant who had examined the motor-car about two months after the accident. They testified that the brakes were in very bad condition and that a vigorous application of the brakes at 30 miles per hour pulled the car fairly violently to its off-side of the road. The appellant had taken delivery of the motor-car a few days before the accident and had driven it from Southampton to his home,

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[14] [1935] A.C. 462.

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a distance of about 20 miles. He had been told by the man from whom he had bought it that the brakes had been overhauled. He noticed, however, during the course of his 20-mile drive home, that the brakes had what he described as a slight tendency to pull the car to the right. The appellant contended that he was not guilty of the offence charged because the danger created by his motor-car when it careered across the road and collided with the oncoming motor-scooter was due solely to the defect in its brakes and was in no way attributable to the manner in which he was driving. This case, therefore, raises a point hitherto undecided, namely, whether a mechanical defect can ever be relied upon as a defence to a charge of driving in a manner dangerous to the public, and, if so, what are the circumstances in which a mechanical defect can be so relied upon.

[His Lordship read section 11 (1) of the Road Traffic Act, 1930, and continued:] If, on a prosecution under section 11 (1), the Crown proves that a motor-vehicle driven by an accused in fact endangers the public, that is strong evidence and, indeed, in any but the most exceptional circumstances, is likely to be regarded by the jury as conclusive evidence that the accused was driving in a manner dangerous to the public. If, however, a motor-car endangers the public solely by reason of some sudden overwhelming misfortune suffered by the man at the wheel for which he is in no way to blame—if, for example, he suddenly has an epileptic fit or passes into a coma, or is attacked by a swarm of bees or stunned by a blow on the head from a stone, then he is not guilty of driving in a manner dangerous to the public: *Hill* v. *Baxter*.[1] It would be otherwise if he had felt an illness coming on but had still continued to drive, for that would have been a manifestly dangerous thing to do. It is true that in the examples given above it may be said that in a sense the man at the wheel was not driving at all, and therefore not driving dangerously. Indeed, that was the view expressed by the Divisional Court in *Hill* v. *Baxter*,[1] a view with which this court entirely concurs. But it is also true that the sudden mischance suffered by the man at the wheel totally prevented him from controlling the movements of the motor-car, and that no fault of his in any way contributed to the danger. On that ground also, it seems to this court that even if the man at the wheel could in any sense be said to be driving, he would not be guilty of driving in a manner dangerous to the public. There does not seem to this court to be any real distinction between a man being suddenly deprived of all control of a motor-car by some sudden affliction of his person and being so deprived by some defect suddenly manifesting itself in the motor-car. In both cases the motor-car is suddenly out of control of its driver through no fault of his. Supposing a man is driving a motor-car at a slow speed close to his near side of a wide road, keeping a proper lookout and exercising all due care and skill, he is clearly driving in a safe manner. He turns the steering wheel to negotiate a gentle bend, but owing to a mechanical defect in the steering mechanism of which he has and could have no knowledge, the steering suddenly fails completely and the wheel turns helplessly in his hands so that the motor-car careers across the road into an oncoming vehicle. In these circumstances clearly the motor-car endangers the safety of the member of the public driving the oncoming vehicle. Nevertheless, it could not truly be said that this danger was created by the manner of the driving of the motor-car which had gone out of control. There would be nothing in the driving which created the danger. It is quite true that if the motor-car had not been driven on the road, no danger to the public would have occurred. It is equally true that if the oncoming vehicle had not been on the road and no member of the public had been in the vicinity, there would have been no danger to the public. The driving of neither vehicle, however, would be the cause, but the driving of each would be the occasion, of the danger. As Lord Goddard C.J. said in *Simpson* v. *Peat*[2]: "It is by no "means impossible, and indeed must on occasions happen, that "a situation of danger arises in which a motorist is involved but "it cannot be said that he caused it by driving dangerously. . . . "Whether the charge is under section 11 or section 12, the "offence can be committed although no accident takes place; "equally because an accident does occur it does not follow that "a particular person has driven either dangerously or without due "care and attention: but if he has, it matters not why he did so. "Suppose a driver is confronted with a sudden emergency "through no fault of his own; in an endeavour to avert a collision "he swerves to his right—it is shown that had he swerved to the "left the accident would not have happened; that is being wise "after the event and, if the driver was in fact exercising the "degree of care and attention which a reasonably prudent driver "would exercise, he ought not to be convicted, even though

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[1] [1958] 1 Q.B. 277; [1958] 2 W.L.R. 76; [1958] 1 All E.R. 193, D.C.

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[2] [1952] 2 Q.B. 24, 27, 28; [1952] 1 T.L.R. 469; [1952] 1 All E.R. 447, D.C.

"another and perhaps more highly skilled driver would have "acted differently."

The facts in *Simpson* v. *Peat*[3] were quite different from those in this case, but the principle enunciated by Lord Goddard C.J. is in point. This court desires to emphasise that cases in which a mechanical defect can successfully be relied upon as a defence to a charge of dangerous driving must be rare indeed. This defence has no application where the defect is known to the driver or should have been discovered by him had he exercised reasonable prudence. To drive a motor-car in such circumstances is manifestly dangerous. The essence of the defence is that the danger has been created by a sudden total loss of control in no way due to any fault on the part of the driver.

It has been argued by counsel for the Crown that even if a mechanical defect can operate as a defence, yet the onus of establishing this defence is upon the accused. It is of course conceded by the Crown that this onus is discharged if the defence is made out on a balance of probabilities. In the opinion of this court, the contention made on behalf of the Crown is unsound, for in cases of dangerous driving the onus never shifts to the defence. This does not mean that if the Crown proves that a motor-car driven by the accused has endangered the public, the accused could successfully submit at the end of the case for the prosecution that he had no case to answer on the ground that the Crown had not negatived the defence of mechanical defect. The court will consider no such special defence unless and until it is put forward by the accused. Once, however, it has been put forward it must be considered with the rest of the evidence in the case. If the accused's explanation leaves a real doubt in the mind of the jury, then the accused is entitled to be acquitted. If the jury rejects the accused's explanation, the jury should convict. It has been suggested by counsel for the Crown that the onus of establishing any defence based on mechanical defect must be upon the accused because necessarily the facts relating to it are peculiarly within his own knowledge. The facts, however, relating to a defence of provocation or self-defence to a charge of murder are often peculiarly within the knowledge of the accused since often the only persons present at the time of the killing are the accused and the deceased. Yet once there is any evidence to support these defences, the onus of disproving them undoubtedly rests upon the prosecution: *Woolmington* v. *Director of Public Prosecutions*.[4] There is no rule of law that where the facts are peculiarly within the knowledge of the accused, the burden of establishing any defence based on these facts shifts to the accused. No doubt there are a number of statutes where the onus of establishing a statutory defence is placed on the accused because the facts relating to it are peculiarly within his knowledge. But we are not here considering any statutory defence. It is most important that the summing-up should contain a careful direction as to the onus of proof. It is equally important that the jury should be clearly told the narrow limits, laid down in this judgment, within which a defence based on sudden mechanical defect can operate.

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[3] [1952] 2 Q.B. 24.

[4] [1935] A.C. 462; 51 T.L.R. 446, H.L.

Counsel for the defence has criticised the summing-up of the deputy chairman on the grounds that the defence was not sufficiently put to the jury and that the direction as to the onus of proof was unsatisfactory. In the opinion of this court, however, it is unnecessary to consider these criticisms in detail because on the evidence in this case it would have been impossible for the defence based on mechanical defect to have succeeded. The accused admitted that he was aware of the tendency of his motor-car to pull to the right when its brakes were applied. It was or should have been obvious to him that the more vigorously the brakes were applied the stronger this tendency would be. It was precisely this mechanical defect which, according to the accused, caused the accident. Even had the jury accepted the whole of the defence evidence it would have been their duty to convict, for it was clearly dangerous for the accused to have driven his motor-car as he did with the knowledge which he possessed.

As to the appeal against sentence, this court considers that this was a bad case of dangerous driving and the sentence was very lenient. There is certainly no reason to reduce it. The appeals against conviction and sentence will, accordingly, be dismissed.

LORD PARKER C.J. I think the court should say that this appellant was disqualified from driving for 12 months. That disqualification was suspended by the court pending the determination of the appeal. Now that the appeal has been dismissed, his disqualification will revive.

Appeals against conviction and sentence dismissed.

Solicitors: *Lesser & Co.; Stokes, Neville-Smith & Grubb, Portsmouth.*

C. J. E.

C. A.

1961
May 10.

Devlin and Davies L.JJ.

YAGER *v.* MUSA.

[1959 Y. No. 1042.]

Contempt of Court—Committal order—Civil contempt—Period of detention, determination of — Third committal order — Application for release—Power to fix future date for release.

The plaintiff was granted an injunction on September 29, 1959, restraining the defendant from causing a nuisance or annoyance to the plaintiff or his family. The defendant disobeyed that injunction and on December 1, 1959, he was committed to prison for contempt. After three months he was released. He was again committed for contempt for breach of the injunction on May 31, 1960, and was released after serving five months' imprisonment. On each occasion the defendant made an affidavit expressing his regret for his disobedience to the order of the court and giving a solemn undertaking to refrain from disobedience in the future. The defendant having again disobeyed the injunction, he was committed to prison for contempt for the third time on December 6, 1960. The defendant having sworn a similar affidavit to those he had previously sworn, he applied for his immediate release. On April 18, 1961, Howard J. ordered that the defendant's application be adjourned generally with liberty to restore, the application not to be restored before the expiration of three months from that date:—

Held, that in principle the court should not make an order which denies to any person access to it, unless he is shown clearly to have been guilty of an abuse of the process of the court. If the court considered that an immediate release of a person committed for contempt was not desirable but that some termination should be put to his imprisonment, it was within the power of the court on an application for release to order that he should be released on a fixed future date; and that, in the circumstances, the defendant should serve a term of imprisonment substantially longer than his second term of imprisonment and that he should be released on August 7, 1961, when he would have been in prison for eight months.

Order of Howard J. varied.

APPEAL from Howard J. in chambers.

This was an application by the defendant, Brima Musa, by the Official Solicitor that he might be released from prison in respect of his contempt in breaking an injunction granted to the plaintiff, Max Yager.

The injunction was granted on September 29, 1959. The defendant had repeatedly disobeyed the injunction. He was committed for contempt on December 1, 1959. He was released on March 8, 1960. On May 31 he was again committed for his contempt in disobeying the injunction. He was released on November 1, 1960. He was committed for contempt for the third time on December 6, 1960. He applied on April 18, 1961, for his release. By an affidavit sworn on March 16, 1961, similar in terms to those which he had sworn on the two previous occasions when he applied for release, he expressed his regret for his disobedience and undertook to refrain from disobedience in the future.

Howard J. ordered that the defendant's application should be adjourned generally with liberty to restore and he ordered that it should not be restored to the list before the expiration of three months from the date of his order.

The defendant appealed. The defendant's release was opposed by the plaintiff.

The facts are more fully stated in the judgment of Devlin L.J.

Neil Butter for the defendant, the appellant. This is an application by the Official Solicitor under section 13 of the Administration of Justice Act, 1960. The Court of Appeal has jurisdiction to order the defendant's release. The order the judge made was wrong in two respects. First, he should in the circumstances have ordered the defendant's immediate discharge from prison. He has been in prison for over 13 months in all and it is now over five months since he was committed for his last contempt. Secondly, the judge was wrong in debarring the defendant from applying for his release for a period of three months. The judge could only make such an order if the defendant had been guilty of an abuse of the process of the court. That is not so in this case. There is no jurisdiction to postpone for a definite time an application for the defendant's release. A change in the defendant's circumstances might make his release imperative. A definite term of imprisonment can be imposed on a person committed for contempt, but there is no report of any decision in which an order of the kind made by Howard J. has been made. The plaintiff's daughter is now married and the defendant will not know where she is. The risk of his again breaking the injunction is lessened. He cannot be kept in prison indefinitely and it is submitted that now is the time for his release. He has apologised and undertaken not to offend again. The only way of testing his sincerity is by his release.

Iain Carmichael for the plaintiff. The plaintiff opposes an order for the defendant's immediate release. It is not a question of punishing the defendant but of protecting the plaintiff's daughter, his family and himself. It does not follow that because the daughter has married that the defendant will not return to his attacks on the plaintiff's family. Indeed, the daughter's marriage may worsen his obsession and there is the risk that he may attack her and her husband. He should be detained for a substantially longer term than he served on his second committal.

DEVLIN L.J. In this case Mr. Butter, instructed by the Official Solicitor, has appeared to appeal from an order made by Howard J. in chambers in relation to the imprisonment for contempt of court of Brima Musa, a coloured man coming from Sierra Leone, who was the defendant in an action, *Yager* v. *Musa*, and was committed for contempt of court for breach of an injunction made in the course of that action.

It is a very unfortunate case. The defendant comes from Sierra Leone, and some years ago, I think in 1958, he obtained employment with the plaintiff and he formed an obsession for the plaintiff's daughter. All that I need say is that it was wholly unreciprocated and in no way encouraged by her. He began to pursue her and to make a nuisance of himself, not only to her but also to the plaintiff and his family. As a result by 1959 he had already got into trouble. He appeared before magistrates for offences that arose out of a disturbance that he created outside the plaintiff's house and for assault, and was sentenced to a term of imprisonment. But that, unfortunately, did not stop his behaviour, and eventually, on September 9, 1959, the plaintiff issued a writ asking for an injunction to restrain the "defendant by himself, his agents or servants or "otherwise . . . causing a nuisance and/or annoyance to the "plaintiff" or to his family by telephoning or by calling on them or by writing to them. Affidavits have been put in which describe the nature of the nuisance. The defendant was ringing up on the telephone and appearing outside the plaintiff's house, and so on. I need not go into them in detail. The consequence was that on September 29, an injunction was granted in the terms of the writ. He disobeyed it and on December 1, 1959, he was committed to prison for his contempt in disobeying the injunction. He was released from that term of imprisonment after about three months on March 8, 1960, but he continued with the same course of action and he was committed for contempt of court again on May 31, 1960. He was released on that occasion after serving five months' imprisonment on November 1, 1960. But he then returned again to the same sort of activity and he was committed for a third time to prison for contempt of court on December 6, 1960. It was an application to be released from that term of imprisonment that was brought before Howard J. in chambers when he made the order under appeal. The order was made on April 18, 1961, and it was thereby ordered "that "the application be adjourned generally with liberty to restore "and be not restored to the list before the expiration of three "months from the date hereof."

On the previous occasions upon which he has been released, the defendant has made an affidavit in which he has expressed his regret for his disobedience and given solemn undertakings that he would refrain from disobedience in the future, but he has broken them. On his appearance before the judge, he was not in a position to do more than he had done before, namely, to give the same sort of apology and undertaking. There has been some change in circumstances. In the first place, the daughter, whom he was molesting, has married and has moved to another address. It is urged on the defendant's behalf that that may well be some sort of guarantee that his pursuit of her will end, because he will not be able to find out what her address is. On the other hand, it is pointed out that it may be that his fixation or obsession, whatever it may be, will be all the more forceful and that he may be tempted to some violent action towards either the daughter or her husband. He has been interviewed while in prison by the medical officer who can find no evidence of any sort of mental disorder. He said that he was told by the defendant that he would make no further attempt to contact or molest the Yager household, but that was qualified by the defendant saying the plaintiff must not interfere with him. The interference in question, that the defendant resents, is apparently the fact that when the plaintiff was approached by other persons prepared to employ the defendant, he would not give him a very glowing reference, which can well be understood in the circumstances. If that is the sort of thing that is regarded as interference and if it is what the defendant had in mind when he said to the prison governor (because we have a report from the prison governor) that he would keep well away from the Yager family but that if they interfered with him he might lose control of himself, then it is plain it is something which has to be seriously considered by the court which is responsible for setting him at liberty. There was also evidence before the judge that in January he spoke to one of the prison officers and said specifically that he would kill Miss Yager and her relatives and that he has had moods since in which he has repeated threats of that sort in a vaguer way.

Unfortunately there is nothing at all that can be done to help the defendant, as there might have been, if he had had some friends or relatives in this country who were prepared to look after him and to some extent to be responsible for his behaviour. He has no friends here; he will not consider returning to Sierra Leone in any circumstances, notwithstanding that the plaintiff had, we understand, earlier offered to pay for him to return there. I may say that we have been told by Mr. Butter, who has said everything that could possibly be said on behalf of the defendant, that the plaintiff has throughout behaved in the most considerate manner possible, notwithstanding the great molestation and annoyance to which he and his family have been subjected.

The question then with which the judge was faced was: what was he to do? The application which was made to him and which has been renewed to us, that he should be released forthwith—that was after he had served some four or five months in prison, hardly longer than his previous term—was declined by the judge and is not, I think, one to which we could properly accede. The question then is: What is to be done with him? It is, as I have said, a distressing case. It is one of those particularly difficult cases because Mr. Butter is quite right when he says there is no way of testing the sincerity of the defendant's further protestations, unless he is allowed out; no one can take them at their face value, having regard to the fact that similar protestations have twice been ignored in the past; but, on the other hand, he cannot be kept in prison indefinitely merely because there is a danger that if he is released he might commit some further act of disobedience. I see no way of dealing with a man of this sort except in the way in which a criminal court deals with a persistent offender, such as a housebreaker, when, after a preliminary warning or probation, it has to impose a sentence of imprisonment. If immediately after he comes out of prison, the housebreaker, notwithstanding that he said he was going to turn over a new leaf, immediately goes back to housebreaking, a longer sentence of imprisonment has to be imposed, and so on. The court has to balance the need for protecting the public from his molestations or depredations against the principle that, subject to that need, no man's liberty should be taken away unnecessarily. In my judgment, the period of imprisonment that the defendant should now serve should be one—this being his third period—which is substantially longer than the second one, which evidently was not sufficient. If when he is released after that he gives any further evidence of disobedience, the inevitable result will be that he will be brought back before this court again and yet a longer period will be imposed upon him, and, if that is not sufficient, then the court will have to impose a longer period still which may amount to something that will keep him in prison for a very long time indeed. That is the only way in which, against irrationality of this kind which falls short of mental disorder, the court can discharge its duty of protecting members of the public, who are molested by men of this sort, and give to them freedom to live their lives without suspense, annoyance and anxiety.

The order made by the judge in this case, which was that the application should not be restored until three months had expired from April 18, is not in a form that is desirable for the court to make. Mr. Butter has urged objections to it, which I think are well founded. On principle it is not desirable that the court should make any order which denies to any person access to it, at any rate unless he is shown clearly to have been guilty of an abuse of the process of the court. There is no evidence of that in this case. I think that what the judge probably had in mind was that, if an application was made on July 18, it would come on in due course and be granted and a release would be made perhaps in early August after the defendant had served eight months, which would compare with his previous terms of three and five months. It is not disputed that that same result could have been achieved by the court simply ordering that the defendant should remain in custody until a fixed date and thereafter be released or that he should be released on such and such a date in the future. That is an order that could have been made in the first instance and it is one which I think it is well within the power of the court to make on an application for release, if the court considers that an immediate release is not desirable but that some termination should be put to the period which a defendant has to serve. I have myself seriously considered whether the period of eight months would be long enough having regard to the fact that this is, as I say, the third application and that really there is no evidence that on his release the defendant will behave

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YAGER v. MUSA.
Devlin L.J.

any better than he has done before. But I think we ought to have regard to the fact that the judge, we are told, saw the defendant, not merely saw him in court or chambers, but spoke to him himself and evidently formed his view as to what was the best thing to do. I do not think, therefore, that we ought to interfere substantially with the view which the judge took. The only thing that in my judgment we should do is to vary the order by substituting for the order that the application be adjourned generally with liberty to restore, an order that the defendant be released on August 7, 1961.

Davies L.J. I agree.

Order of Howard J. varied by ordering the release of the defendant on August 7, 1961.

Solicitors: *Official Solicitor; Offenbach & Co.*

B. A. B.

C. A.
1961
April 28.
Ormerod, Willmer and Danckwerts L.JJ.

GAVAGHAN v. EDWARDS.

[Plaint No. Q1641A.]

Vendor and Purchaser—Memorandum in writing—Two documents—Standard form of contract—Date for completion to be agreed—Subsequent oral agreement on date—Solicitor acting for both parties—Note of agreement by solicitor—Whether authorised to sign memorandum—Law of Property Act, 1925 (15 *&* 16 *Geo.* 6, *c.* 20), *s.* 40.
Solicitor—Authority—Memorandum of contract—Solicitor acting for both vendor and purchaser.

The plaintiff agreed to sell and the defendant agreed to purchase a house. The terms of the sale were contained in a standard form of contract which the vendor obtained from an estate agent and which vendor and purchaser signed over a sixpenny stamp. The contract stated that the date for completion was to be agreed between the parties. Apart from the date of completion, all the other conditions of the contract were agreed and referred to in the document which the parties had signed.

The vendor's solicitor was instructed to act in the purchase on behalf of the purchaser as well as the vendor. Subsequently, the vendor and purchaser orally agreed on the date for completion. The vendor informed the solicitor of the agreed date, and the solicitor wrote to the purchaser asking for confirmation. The purchaser telephoned the solicitor and confirmed the date, and the solicitor endorsed a note to that effect on a copy of the letter that he had sent the purchaser.

The purchaser refused to complete and the vendor sued the purchaser for damages for breach of contract. On the question whether there was a memorandum in writing of the contract as required by section 40 of the Law of Property Act, 1925 [1]:—

Held, that as the parties had in fact agreed and there was no conflict of interest between them, there was nothing contradictory in the position of a solicitor acting for both parties which would prevent him from creating an additional memorandum for the purpose of recording a final term agreed by the parties so as to bind either or both of his clients; and as the solicitor had received specific confirmation from the purchaser of the sole matter not originally agreed between the parties, his copy letter and note endorsed thereon constituted a memorandum binding on the purchaser (post, p. 227).

Wright v. *Pepin* [1954] 1 W.L.R. 635; [1954] 2 All E.R. 52 distinguished.

Appeal from Judge Ingress Bell, sitting at Gloucester County Court.

The following statement of facts is taken substantially from the judgment of Danckwerts L.J. The material events relating to the sale and purchase of the house in question began in April and May of 1958. A man called Harris apparently introduced the plaintiff, William Gavaghan, hereinafter called "the vendor," to the defendant, Ronald James Edwards, hereinafter called "the purchaser," in April or at the beginning of May, and early in May the vendor telephoned the purchaser and said he was now able to talk business. On May 6, 1958, the two parties met at the vendor's house and agreed a price of £4,500. It appeared from what subsequently happened that that was a much better price than the vendor might have expected because as the result of what happened subsequently the house was sold for £3,300 and it was not claimed that that was an unduly low price. That might account for the unwillingness of the purchaser to go through with the sale. The vendor said he would see his solicitor and have something ready for the purchaser to sign. It was suggested that it might be convenient if the same solicitor was employed, that was to say, the vendor's solicitor, with a view to saving money. However, the vendor on May 7, 1958, went to an estate agent and obtained a standard form which he typed out, filling in the blanks, and that form was in fact signed, it appeared, by both parties over a sixpenny stamp. It was what might be described as a rather detailed and complete contract or formal contract. It was dated May 7, 1958, made between the vendor and the purchaser, and clause 2 provided that "the property is sold subject "to the Law Society's Conditions of Sale, 1953, with any amend-"ments thereof which may be effective at the date hereof (such "conditions being hereinafter referred to individually by the "designation 'general condition' together with the number "thereof) so far as they are not varied by or inconsistent here-"with." The price was stated, there was a provision for a deposit, and provision for vacant possession to be given on completion. Clause 6 provided: "The date fixed for completion is "to be agreed between the parties," and then it provided that completion was to take place at the office of the vendor's solicitors.

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[1] Law of Property Act, 1925, s. 40: "(1) No action may be brought "upon any contract for the sale or "other disposition of land or any "interest in land, unless the agree- "ment upon which such action is "brought, or some memorandum or "note thereof, is in writing, and "signed by the party to be charged "or by some other person thereunto "by him lawfully authorised."

The purchaser did not complete the purchase and the vendor had to sell the house to someone else. On a claim by the vendor against the purchaser for damages for breach of contract, the judge held that the standard form of contract was not a completed and binding contract but that the solicitor instructed on behalf of both parties had made a memorandum in writing of the contract, and, accordingly, he gave judgment for the vendor.

The purchaser appealed.

J. H. Ellison for the purchaser. The first submission is that the judge was right in holding that the standard form of contract did not constitute a binding contract or a memorandum of such contract. Where an agreement does not provide for a definite date for completion, it cannot be a final and completed contract: *Johnson* v. *Humphrey*.[2]

Secondly, a solicitor acting for both parties cannot make a memorandum for the purposes of section 40 of the Act of 1925 so as to bind one party in favour of the other without the express authority of the party to be bound. Alternatively, the court ought to be very circumspect before drawing the inference that a solicitor has implied authority to bind one client contractually in favour of the other, and the inference should only be drawn

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[2] [1946] 1 All E.R. 460.

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where a solicitor is instructed to manage his client's affairs generally. Until the telephone conversation the solicitor in this case had never seen, heard or known the purchaser. It is conceded that the solicitor was employed to do some work, but there was no positive evidence as to what his instructions were, and in those circumstances it would be wrong to infer that he had implied authority to make a memorandum.

Cohen v. *Roche* [3] is admittedly authority against those propositions where an auctioneer acts for both parties; but that is a totally different situation because there is something approaching an express authority in the purchaser shouting his name at an auction, and the whole contract is completed on the same day as the auction. The modern tendency is to restrict the authority that can be implied to solicitors. *Wright* v. *Pepin* [4] is the only case where solicitors acting for both parties had signed a document, and they were held [5] to have had no authority to bind their clients.

While it is true that instructions to a solicitor in the purchase of land cannot be too exact because the client does not know precisely what work is required to be done, there must be a distinction between instructions to carry out the necessary formalities of a purchase, such as examining the title to the land, and specific instructions to bind the client contractually. Examining title in no way binds a client, and, whatever the instructions given by the purchaser here to the solicitor were, they fell within the first of the above categories and did not amount to an authority to bind him contractually. Even instructing a solicitor to negotiate the terms of a lease does not give him authority to make a memorandum binding on his client: *Forster* v. *Rowland*.[6] Equally, instructing a solicitor to prepare a formal document or to write a letter communicating a fact does not give him authority to sign a memorandum: *Smith* v. *Webster*.[7] Similarly, the instructions in the present case could not authorise the solicitor to make a memorandum. *Grindell* v. *Bass* [8] decided that a defence signed by counsel constituted a binding memorandum, but that case is distinguishable because a pleading is a formal document intended to have legal consequences. *Smith-Bird* v. *Blower* [9] is similar to the present case, but whereas there the client's letter to his solicitor constituted a memorandum, the client's phone call in the present case cannot itself be a memorandum. The proper inference here is that the note of the phone conversation by the solicitor was merely an aide-mémoire made for the solicitor's personal use and not intended to have any legal effect. A receipt for the purchase-money signed by the solicitor would not be any more efficacious as a memorandum than a receipt signed by a bank. *Rosenbaum* v. *Belson* [10] is distinguishable because express authority was given to sell the property, and that must include implied authority to sign a memorandum: similarly, if, as in *North* v. *Loomes*,[11] a solicitor is given express authority to complete a contract. But if the authority given to a solicitor is not as extensive as that, authority to sign a memorandum cannot be implied; a fortiori if he acts for both parties.

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[3] [1927] 1 K.B. 169; 42 T.L.R. 674.

[4] [1954] 1 W.L.R. 635; [1954] 2 All E.R. 52.

[5] [1954] 1 W.L.R. 635, 639.

[6] (1861) 7 H. & N. 103.

[7] (1876) 3 Ch.D. 49, C.A.

[8] [1920] 2 Ch. 487; 36 T.L.R. 867.

[9] [1939] 2 All E.R. 406.

M. R. Hoare, for the vendor, was not called on.

ORMEROD L.J. I will ask Danckwerts L.J. to deliver the first judgment.

DANCKWERTS L.J. stated the facts and continued: There is a cross-notice in respect of a point which was decided against the vendor and the point of the cross-notice is that the judge held that the standard form of contract was not a completely binding contract because the provision "The date fixed for completion is to be agreed between the parties" by implication eliminated the provision regarding completion which will be found in the Law Society's conditions of sale (which is a date seven weeks from the creation of the written agreement). It is unnecessary for us, it seems to me, to consider that point, which was decided against the vendor, because on the view which I have reached the judge reached a conclusion correctly in favour of the vendor upon the other point which is before us upon the purchaser's appeal.

I think it was actually not at the original meeting on May 6, 1958, but at the subsequent meeting on May 7, 1958, when the standard contract was signed that the vendor suggested that the purchaser should go to the vendor's solicitors, and on May 8, 1958, the agreement was taken to the vendor's solicitors, Rowberry & Co., and the solicitor in charge of the matter was one Apperley. I think it must be fairly clear that the vendor told his solicitor on that occasion that the purchaser wished the solicitor to act for him also as well as for the vendor. On May 9, 1958, a letter was written by one Apperley of Rowberry & Co. to the purchaser as follows: "Dear Sir, 128b, Cheltenham Road, Gloucester. "Mr. Gavaghan has passed to us the contract signed by you and "him for your purchase of the above property. We understand "that you would like us to act also for you in the matter, which "we shall be pleased to do. It appears that completion is not "likely to take place for some little time, but we will in the "meanwhile proceed with what is necessary and will get in "touch with you again as soon as required." No answer was returned by the purchaser to the letter. On the other hand, he did not write back saying: "It is not right; I do not want you "to act for me," and I think it is a fair inference that he accepted that the instructions which had been given to the solicitor on behalf of the purchaser had been correctly given. By inference, therefore, it seems to me that from the date of the receipt of that letter, or perhaps even at an earlier date when he received instructions from the vendor, Rowberry & Co. and Apperley must be taken to have been instructed to act in regard to the purchase on behalf of the purchaser as well as the vendor. It is hardly necessary to say that I regard this situation as very unsatisfactory. In many cases it may work perfectly all right, but if anything whatever goes wrong with regard to the sale, a solicitor who is acting for both parties is almost certainly placed in a position where the interests conflict and a difficult situation is likely to arise.

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[10] [1900] 2 Ch. 267.

[11] [1919] 1 Ch. 378.

Apparently, at some date which must have been just before the next letter, which is of May 15, 1958, the vendor and the purchaser met and agreed on the date for completion. January 31, 1959, must have been the date agreed because on May 15, 1958, the firm of Rowberry & Co., that is, Apperley, wrote another letter to the purchaser in these terms referring to the property: "Further to our letter of the 9th instant, Mr. Gavaghan "now informs us that the date for completion agreed between "you and him under the contract is 'January 31, 1959, or earlier "'by arrangement.' May we take it please that this is in "order?" It is signed "Rowberry & Co." and then there is a note apparently endorsed on the copy of this letter—the original, of course, had been sent to the purchaser—"16/5/58 Edwards "phoned and confirmed above." I do not think it has been really disputed in the evidence that such a telephone conversation did take place; nor has it been really disputed that there was in fact an agreement reached between the vendor and the purchaser that the date for completion should be as is stated in that letter. But the real point which is taken is that a solicitor normally has no authority either to enter into a contract or to sign a memorandum on behalf of his client even though employed in regard to the completion of the sale which is in question, and, therefore, if there was no authority to sign on behalf of the purchaser, there is no memorandum in accordance with section 40 of the Law of Property Act, 1925, signed by the party to be charged or some agent on his behalf.

Now, it is no doubt correct (and there are cases which so hold) that the mere fact of the relationship of solicitor and client being constituted in regard to a particular purchase does not by implication give a solicitor any authority to make a contract or to sign a memorandum, and I may refer to *Forster* v. *Rowland*[1] and *Smith* v. *Webster*.[2] But that is not a hard and fast rule which is not capable of alteration. On the facts of the case, as it seems to me, from the way in which the instructions are given to the solicitor, he may by implication be entitled to sign a memorandum which will bind his client. There are cases where such an authority has been implied from the terms of the particular relationship created on the facts of the case. *Rosenbaum* v. *Belson*[3] is such a case, although the circumstances of that case are no doubt different from the present. The striking feature in the present case, as it seems to me, is that there was a contract which on its terms was so complete that it needed no further implementation in any way except in regard to one single term and that was the date for completion. That was plainly, upon the evidence, a term which in fact was agreed between the parties subsequently, and the only point is whether, when the solicitor subsequently by way of confirmation wrote the letter of May 15, that would bind his client so as to complete a memorandum which would satisfy section 40 of the Act of 1925.

Now there are cases where the conflict of interest between the two parties and the position, therefore, of a solicitor may be so difficult that he could not properly do something which would bind one party to the other. No doubt that was the situation in *Wright* v. *Pepin*,[4] which was decided by Harman J., with regard to an acknowledgment for the purpose of the Limitation Act, 1939, and where the solicitor in question, acting for both parties, was held not to be able to give an acknowledgment which would prevent the statute running. But that seems to me to be a very different case from the present. It seems to me that where the parties have in fact agreed, as is the situation in the present case, there is nothing contradictory in the position of a solicitor acting for both parties which will prevent him creating an additional memorandum for the purpose of recording a final term agreed by the parties so as to bind either or both of his clients. To my mind the inference from what happened in the present case is plainly that the solicitor had such authority. He may not have had authority to make a memorandum before he wrote the letter of May 15, 1958, but as the result of the conversation which took place with his client, the purchaser, when his client confirmed that the position was as stated in the letter, that seems to me to authorise the signing of the memorandum, as a matter of confirmation apart from any difficulties, if there were any, which existed before that as to the terms of the solicitor's instructions and authority.

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[1] (1861) 7 H. & N. 103.
[2] (1876) 3 Ch.D. 49, C.A.
[3] [1900] 2 Ch. 267.
[4] [1954] 1 W.L.R. 635; [1954] 2 All E.R. 52.

In those circumstances it seems to me the necessary memorandum for the purpose of satisfying section 40 of the Act of 1925 was completed by the letter of May 15, 1958, to which there is a signature by the solicitor as agent on behalf of the purchaser. It seems to me that on this point the judge reached the right conclusion and that really disposes of the case. Accordingly, the appeal should be dismissed.

ORMEROD L.J. I agree and there is nothing I wish to add.

WILLMER L.J. I also agree.

Appeal dismissed with costs.
Application for leave to appeal to the House of Lords refused.

Solicitors: *Devonshire & Co. for Bretherton & Sons, Gloucester; Kinch & Richardson for T. Warren-Green, Cheltenham.*

N. P.

C. A.

1961
April 14.

Ormerod, Willmer and Danckwerts L.JJ.

AYLING *v*. WADE.

[Plaint No. 901034.]

Landlord and Tenant—Sublease—Repairs, covenant for—Covenant to observe covenants in head lease—Repairing covenant in head lease—Whether covenant merely of indemnity—Whether covenant imposes duty to repair—"Observe"—Meaning—"Window"—Meaning.

By a clause in an underlease the landlord covenanted with the tenant "to pay the rent reserved by and to observe the covenants "contained in the lease, under which the landlord holds the demised "premises, and to keep the tenant indemnified against the "same . . ." By the terms of the head lease, under which the landlord held the demised premises, he was required to keep the premises in good and substantial repair.

The plaintiff was the tenant and the defendant the landlord under the underlease of a restaurant, which was part of the premises held by the landlord under the head lease. The tenant covenanted with the landlord to keep the interior of the premises, including all windows, in good and substantial repair. There was no express covenant with regard to exterior repairs.

The glass in the skylight in the flat roof on top of the restaurant had been broken and ineffectively repaired by the landlord. As a result rainwater poured into the restaurant and the tenant was compelled to close it temporarily, during which time the tenant suffered loss of profits amounting to £38 19s. On a claim by the tenant to recover this sum as damages for breach of covenant:—

Held, that the covenant by the landlord to observe the covenants contained in the head lease was not a covenant to indemnify the tenant in the event of the superior lessor's taking proceedings for forfeiture, but was a covenant requiring the landlord to perform the repairing obligations imposed on him by the head lease; therefore, the tenant's claim succeeded (post, pp. 234, 235).

In re Poole and Clarke's Contract [1904] 2 Ch. 173; 20 T.L.R. 604, C.A.; *Harris* v. *Boots Cash Chemists* (*Southern*) *Ltd.* [1904] 2 Ch. 376; 20 T.L.R. 623; and *Reckitt* v. *Cody* [1920] 2 Ch. 452 distinguished.

Per curiam. "Observe" means to comply with an obligation and has a positive as well as a negative meaning.

Quaere. Whether a "window" includes a skylight.

APPEAL from Judge Leslie, sitting at Woolwich County Court.

The following statement of facts is taken substantially from the judgment of Danckwerts L.J. The defendant, William Charles Wade, had acquired the term created by a lease dated June 23, 1877, under which he held the premises situate at and known as 5, Eltham Road, London, S.E.12. The defendant covenanted in the lease with the superior lessor, inter alia, to keep the premises in good and substantial repair. By an underlease dated December 31, 1957, and made between the defendant and John Denys Dennison, who subsequently assigned the term created by the underlease to the plaintiff, George William Ayling, the defendant sublet part of the premises consisting of a lock-up shop or restaurant with kitchen and lavatory accommodation on the ground floor to Dennison for a term of seven years from December 25, 1957, at a rent of £182 per annum. Although the actual assignment of the underlease by Dennison to the plaintiff was not completed apparently until August, 1959, the plaintiff went into possession at Easter, 1958. The defendant as the landlord covenanted in the underlease with the plaintiff as the tenant, inter alia, to observe the covenants contained in the head lease, under which the landlord held the premises. The trouble in the present case arose because there was a skylight in the flat roof on top of the restaurant and, owing to the glass in the skylight having been broken previously and a very ineffective repair having been made by the landlord, rainwater poured into the restaurant. The tenant was compelled to close the restaurant temporarily while the skylight was being effectively repaired, during which period the loss of his profits amounted to £38 19s. In an action by the tenant against the landlord for damages for breach of covenant, the plaintiff claimed that the landlord was liable to pay £38 19s. damages for breach of the covenant to observe the covenants contained in the head lease. The judge held that that sum was the proper amount which was recoverable, if the plaintiff's claim was well founded, but he held that under the terms of the underlease there was no breach of covenant by the landlord, and he dismissed the tenant's claim. The tenant appealed.

A. J. Bateson for the tenant. Clause 3 (1) of the underlease is wide enough to incorporate all the covenants contained in the head lease. The covenant by the landlord to observe the covenants contained in the superior lease is a convenient, short method of imposing on the landlord vis-à-vis the tenant the obligations that he undertook vis-à-vis his superior landlord. The cases where a covenant like this has been construed as a covenant merely of indemnity are those where it has been contained in an assignment and not in the lease. It was accepted that a skylight was not a window, the tenant being obliged to repair windows, and therefore the duty to repair the skylight was part of the duty to repair the exterior—a duty imposed on the landlord by the head lease.

Looking at the whole of the lease, the tenant was intended to execute the internal repairs, the landlord the external. The covenant by the tenant to permit the landlord to enter upon the premises for the purpose of doing repairs indicates that the landlord was intended to carry out repairs other than those specifically imposed on the tenant by the lease, which is because in an assignment such a covenant cannot be construed otherwise, the assignor having no further rights to or interest in the property. No particular words are necessary to create a covenant; all that is required is the clear indication of an intention to create the obligation: see Woodfall on Landlord and Tenant, 26th ed., vol. I (1960), p. 508.

The judge was impressed by the absence of the word "perform" and the absence of an express repairing covenant on the part of the landlord. But there is no particular magic in the word "perform," nor in an express covenant, if the intention to create a repairing obligation is clearly indicated. "Observe" is a sufficiently plain word to create the obligation. "Observe" means to comply with, and covers positive as well as negative covenants. It is common to speak of observing the speed limit, or of a rule being honoured more in the breach than in observance.

Alternatively, the tenant can rely on the second part of clause 3 (1). The tenant is entitled to be indemnified by the landlord for the loss of profits that have been suffered due to the landlord's breach. An indemnity carries with it more than obtains under a simple repairing covenant: see *per* Lindley L.J. in *Ebbetts* v. *Conquest*.[1] There is a different measure of damages between a covenant to repair and a covenant of indemnity.

The judge interpreted clause 3 (1) so that the first part of it was surplusage, and so that the second part, the indemnity, only operated in the event of the superior landlord taking proceedings. He was wrong on both points.

C. M. G. Butterfield for the landlord. There must be a clear repairing covenant imposed on a landlord before he is under a duty to repair—the duty cannot be implied: *Gott* v. *Gandy*.[2] The fact that there is a licence to the landlord to enter on the premises and do repairs is not decisive of whether there is an obligation on him to repair. The effect and sole purpose of clause 3 (1) read as a whole is that it is merely an indemnity to the tenant if the superior landlord takes steps to forfeit the head lease. It is a complementary clause to the covenant for quiet enjoyment, for without it the tenant would not be adequately covered by the covenant for quiet enjoyment. Clause 3 (1) is a standard form of indemnity clause and is so regarded by conveyancers.

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[1] [1895] 2 Ch. 377, 382; 11 T.L.R. 454, C.A.; affirmed sub nom. *Conquest* v. *Ebbetts* [1896] A.C. 490; 12 T.L.R. 599, H.L.

[2] (1853) 2 El. & Bl. 845; 118 E.R. 984.

Where a covenant repeats an obligation that has already been agreed, the repetitive covenant is one of indemnity only: *Hornby* v. *Cardwell.*[3] A covenant of indemnity is a personal covenant and does not run with the land. Since there has been an assignment of the term, the tenant cannot rely on the indemnity until the mesne landlord is sued by the superior landlord. Otherwise the landlord would be required to observe the covenants affecting the remaining parts of the land not demised to the tenant. It is common for tenants to have no greater right than that of quiet enjoyment.

The cases on assignment, *In re Poole and Clarke's Contract,*[4] *Harris* v. *Boots Cash Chemists (Southern) Ltd.*[5] and *Reckitt* v. *Cody,*[6] assist, for covenants in similar terms were construed merely as covenants of indemnity. If such a covenant is not a covenant of indemnity only, strange results would follow. If the mesne landlord obtained the reversion of the head lease so that the underlease merged with the head lease, the landlord would be liable under the terms of the merged head lease to repair. The tenant could insist on the performance of covenants that the superior landlord had waived or on covenants as to repairs governed by section 18 of the Landlord and Tenant Act, 1927.

[DANCKWERTS L.J. If there were a merger, there might not be any enforceable repairing covenants on the landlord.]

If that were so, there would be the fantastic position that at one moment the mesne landlord was under a repairing obligation, and at the next moment he was not. The odd results that flow from the tenant's construction show it to be unsound.

The draftsman must have intended to distinguish between "observe" and "perform." Both those words appear in clause 3 (2), the covenant on the landlord to give quiet enjoyment, and the absence of the word "perform" in clause 3 (1) shows that no active obligation was to be imposed on the landlord by that covenant. Stroud's Judicial Dictionary, 3rd ed., vol. 3 (1953), p. 1948, supports the view that when "observe" is used in contrast to "perform," it does not cover positive obligations. "Observe" in clause 3 (1) means that the landlord must see that he complies with the requirements of the superior lessor. If the superior lessor waives a breach by the landlord, the landlord cannot be under an obligation to the tenant in respect of the same breach. The tenant cannot impose a greater burden on the landlord than that imposed by the superior landlord. It would have been simple to have inserted an express repairing covenant on the landlord, if that was intended; its absence indicates the absence of any such intention.

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[3] (1881) 8 Q.B.D. 329, C.A.

[4] [1904] 2 Ch. 173; 20 T.L.R. 604, C.A.

[5] [1904] 2 Ch. 376; 20 T.L.R. 623.

[6] [1920] 2 Ch. 452.

A. J. Bateson was not called on to reply.

ORMEROD L.J. I will ask Danckwerts L.J. to deliver the first judgment.

DANCKWERTS L.J. This appeal turns upon the proper construction to be given to the terms of an underlease dated December 31, 1957. [His Lordship stated the facts set out above and continued:] In the underlease, the tenant's covenants included first, the usual covenant to pay the reserved rent, and, secondly, "to keep the interior of the premises, including all "doors, windows, and landlord's fixtures, in good and substantial "repair and properly painted, limewashed, papered, and var-"nished as from time to time required." Apparently, it is accepted that a window does not include the skylight in the present case, a matter on which I think I should have felt some doubt. Then No. 4 of the tenant's covenants was: "To permit "the landlord with workmen and others to enter upon the "premises and repair in accordance with the covenants and "provisions of the lease, under which the landlord holds the "premises, and so far as any defects remedied by the landlord "may be included in the tenant's covenant to repair herein-"before contained forthwith to repay the costs of remedying "such defects to the landlord as a liquidated debt." That, of course, is merely a permissive covenant in the first part to enable the intermediate landlord, the defendant, to comply with the covenants to which he is subject under the head lease; but it does, it is said, indicate that the carrying out of some repairs by the intermediate landlord is contemplated by the terms of this underlease. No. 7 of the tenant's covenants contained the common provision requiring the tenant "to yield up the premises at the "determination of the tenancy in such good and substantial "repair as shall be in accordance with the tenant's covenants "hereinbefore contained and with all locks keys and fastenings "complete." Clause 3 of the underlease deals with covenants by the landlord. The opening words are: "The landlord hereby "covenants with the tenant," and clause 3 (1) is: "To pay the "rent reserved by and to observe the covenants contained in the "lease, under which the landlord holds the demised premises, "and to keep the tenant indemnified against the same and "against all rates, taxes, and outgoings, whatsoever which now "are or hereafter may become payable in respect of the demised "premises." Clause 3 (2) is a covenant for quiet enjoyment: "That the tenant paying the rent hereby reserved and performing "and observing the several covenants on his part herein contained shall peaceably hold and enjoy the demised premises "during the said term without any interruption by the landlord "or any person rightfully claiming under or in trust for him."

The argument has turned principally on the terms of clause 3 (1) of the underlease. On the face of it, it is a definite covenant by the landlord—it is one of his covenants—to pay the rent reserved and to observe the covenants contained in the lease under which he (the landlord) holds the demised premises; and that, of course, it must be remembered, included not only the demised premises but also a larger piece of property. The judge came to the conclusion that this covenant was to be construed merely as a covenant of indemnity, so that apparently no liability would be cast upon the intermediate landlord until steps had been taken against him to forfeit the lease; and it was argued that this was a provision which was merely intended to protect the undertenant against forfeiture of the lease by reason of the fault of his immediate landlord in performing covenants which were binding upon him under the terms of the head lease.

The words on their face seem to me sufficiently plain, but reliance has been placed upon certain cases where, it must be admitted, on very similar words the covenant concerned, in the case of assignments, has been held to be no more than a covenant of indemnity, so that an assignor could not sue the assignee in respect of the covenants unless and until the landlord was proceeding against him as being a person liable to the obligations imposed by the covenants in the lease. Those cases are *In re Poole and Clarke's Contract*[1]; *Harris* v. *Boots Cash Chemists (Southern) Ltd.*[2] and, I think, *Reckitt* v. *Cody*.[3] The difference, of course, is that in the case of assignor and assignee, once the assignor has assigned the premises, he is not really interested in the condition of the premises or in anything else except the possibility of being sued by the landlord under his original obligations, because he has no longer any estate or interest in the property, and it is only the assignee who is concerned to see that the tenancy continues without any proceedings by the landlord to determine it under the condition of re-entry.

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[1] [1904] 2 Ch. 173; 20 T.L.R. 604, C.A.

[2] [1904] 2 Ch. 376; 20 T.L.R. 623.

[3] [1920] 2 Ch. 452.

In the present case, the situation is rather different, because the landlord of the undertenant is still interested in the property and is still a tenant. He is still liable upon the terms of the lease, and he is not only interested in the terms of the head lease by virtue of his position remaining that of tenant, but he is also interested in the condition of the premises because he is the landlord of the undertenant. Consequently, it seems to me that the rather narrow construction which was put upon somewhat similar forms of words in the case of covenants between assignee and assignor is not necessarily that which ought to be applied in an underlease of this kind.

It is said, of course, that if a landlord is to be subject to liability to repair, plain words must be found in the lease in question, because, as is well known, it is normally the tenant who has to perform various obligations, and it is perhaps not so common for the landlord himself to undertake obligations. It is undoubtedly the case that, whether it is the tenant or the landlord, unless there are repairing covenants, generally speaking there are no obligations to carry out repairs, and it may be that nobody is under any obligation to do any repairs at all. That, of course, is subject to the implied obligations which are cast upon a tenant to keep the premises wind- and water-tight, and that sort of thing, which, however, is a matter which is not material in the present case; but it is undoubtedly true that a landlord is not liable normally to repair the premises, and one must find a covenant which casts that obligation upon him.

It seems to me that there is such a covenant in the present case. The words seem to me to be perfectly plain. The words "to pay the rent reserved" must be an obligation cast upon the landlord to pay the rent which is reserved by the superior lease, and I cannot see why the words which follow, "to observe "the covenants contained in the lease under which the landlord "holds the demised premises," are not also a positive obligation cast by the terms of the underlease upon the intermediate landlord to carry out those obligations, and one which is enforceable by the undertenant, because this is definitely a covenant by the intermediate landlord with the undertenant. He has no doubt covenanted also with the superior landlord to perform exactly similar obligations; but it seems to me that the effect of these words is to make a covenant between the underlandlord and the tenant, and, of course, it applies to a matter in which the subtenant is vitally interested. Unless that is the proper construction, it seems hardly necessary to put in these words. It would have been more accurate conveyancing merely to have placed a covenant in the underlease by which the landlord undertook to indemnify the undertenant against any results of non-performance of the covenants in the superior lease. In other words, it seems to me that if one construes this in the present case merely as a covenant of indemnity, one applies one-half of the provision with which we are concerned and does not apply the first part of it which imposes a positive obligation upon the underlandlord.

It is said that this produces odd and unexpected results, and it was suggested that if the original tenant—that is to say, the landlord in the underlease—were to acquire the superior term, the position would be very obscure, and possibly the covenant would then have no subject-matter any longer to which it could refer, because the covenants in question would have ceased to be operative. That may or may not be the result in such a situation, and I do not think it is necessary for me to express a view upon the matter. But we are faced with construing the actual words which are inserted by the landlord, who prepares a lease in cases of this kind, and they must, it seems to me, be given their plain meaning.

There is one other point which it is necessary, I think, to consider. The judge was impressed by the fact that the word "observe" only was used in this connection and not the word "perform." It was pointed out that in the covenant for quiet enjoyment there was a reference to the tenant performing and observing the covenants on his part; but it seems to me that nothing much can be made of that. We were referred to Stroud's Judicial Dictionary (3rd ed., vol. 3 (1953), p. 1948), where there is some discussion of the relative meaning of the words "observe" and "perform" in respect of negative and positive covenants; but it seems to me that that discussion has really no relation to the problem with which we have to deal in this case. The word "observe" is not a purely negative word. It cannot, I think, mean that the covenantor may simply sit by, noticing what is happening and doing nothing. What it means, I think, is "to

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"comply with the obligation" and, therefore, it has a positive and not merely a negative meaning. It plainly must have a positive as well as a negative meaning in the present case because, without that, the indemnity part of the covenant would be useless, and the indemnity part of the covenant refers to the same covenants as those referred to in the earlier part of the clause. Consequently, it seems to me that (wisely or unwisely it is not necessary to say) the landlord in this case had undertaken to carry out the obligations imposed upon him by the head lease in such a way as to be liable to his tenant, and that those obligations must contain the repairing covenant, which is a full one, an extract in respect of which has been put in evidence in the present case.[4]

Consequently, I have come to the conclusion that the judge reached the wrong result, and the appeal should be allowed.

ORMEROD L.J. I agree that the appeal should be allowed; and, although we are disturbing the decision of the judge, there is nothing I wish to add to the reasons which have already been given by Danckwerts L.J.

WILLMER L.J. I also agree, and I do not think I can add anything to what has already been said by Danckwerts L.J.

Appeal allowed with costs.
Judgment for the plaintiff for the sum of £38 19s. with costs in court below on scale 3.

Solicitors: *H. Ragol-Levy; Braund & Fedrick.*

N. P.

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[4] The covenant required the landlord to keep the premises in good and substantial repair.

REGINA *v.* MORRIS.

C. C. A.

1961
May 9.

Lord Parker C.J., Ashworth and Lawton JJ.

Crime—Sentence—Hospital order—Discretion—Diminished responsibility — Evidence that degree of mental incapacity more severe — Arrangement made for admission to local hospital—No evidence of vacancy in special hospital—Sentence of life imprisonment—Whether wrong in principle—Mental Health Act, 1959 (7 *&* 8 *Eliz.* 2, *c.* 72), *s.* 60.

Crime — Homicide — Diminished responsibility — Insanity — Whether prosecution entitled to call evidence of (post, p. 241).

The defendant, who was charged with murder, pleaded diminished responsibility and was convicted of manslaughter. During the trial the judge refused to allow the prosecution to tender rebutting evidence of insanity, but evidence was given by witnesses for the prosecution that the defendant's mental illness might be worse than that spoken to by his own doctors. There was evidence that the defendant could be admitted to a local hospital, but no evidence was given that a place was available for him in a special hospital. The defence applied for a hospital order under section 60 of the Mental Health Act, 1959,[1] in lieu of sentence but

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[1] Mental Health Act, 1959, s. 60: "(1) Where a person is convicted before a court of assize or quarter sessions of an offence other than an offence the sentence for which is fixed by law, . . . and the following conditions are satisfied, that is to say—(*a*) the court is satisfied, on the written or oral evidence of two medical practitioners (complying with the provisions of section 62 of this Act)—(i) that the offender is suffering from mental illness, . . . and (ii) that the mental disorder is of a nature or degree which warrants the detention of the patient in a hospital for medical treatment, . . . and (*b*) the court is of opinion, having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of an order under this section, the court may by order authorise his admission to and detention in such hospital as may be specified in the order. . . . (3) An order for the admission of an offender to a hospital . . . shall not be made under this section unless the court is satisfied that arrangements have been made for the admission of the offender to that hospital in the event of such an order being made. . . . (6) Where an order is made under this section, the court shall not pass sentence of imprisonment. . . ."

S. 65: "(1) Where a hospital order is made in respect of an offender . . . and it appears to the court, having regard to the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large, that it is necessary for the protection of the public so to do, the court may, . . . further order that the offender shall be subject to the special restrictions set out in this section, either without limit of time or during such period as may be specified in the order. . . . (3) The special restrictions . . . are . . . (*a*) none of the provisions of Part IV of this Act relating to the duration, renewal and expiration of authority for the detention of patients shall apply. . . . (*b*) no the judge, passing sentence, said that he was not sure that the defendant's mental health was not worse than that of diminished responsibility and that he was not going to have the responsibility of setting him anywhere near liberty but would pass such a sentence as would involve him being in the hands of the Secretary of State who had power to send him to the right place, and sentenced the defendant to life imprisonment.

On appeal against that sentence on the ground, inter alia, that it was wrong in principle:—

Held, that where punishment as such was not intended and the sole object of a sentence was that a defendant should receive mental treatment and be at large as soon as he could safely be discharged, a proper exercise of the discretion under section 60 required that the powers under that section should be exercised, and that the matter should not be left to be dealt with by the Secretary of State under section 72; but that, in the particular circumstances of the case, the judge having felt that the defendant's mental condition was such that he should not be admitted to a local hospital, and there being no evidence of a vacancy in a special hospital, the judge had properly exercised his discretion and the sentence was not wrong in principle.

Appeal against sentence.

The appellant, Philip Morris, was indicted at Glamorgan Assizes, before Jones J., with the murder of his wife, and on pleading diminished responsibility under section 2 of the Homicide Act, 1957, was convicted of manslaughter.

During the trial two doctors for the defence gave evidence that the defendant was suffering from depression superimposed

"application shall be made to a "Mental Health Review Tribunal in "respect of the patient under section "63 of this Act or under any provi- "sions of the said Part IV; (*c*) the "following powers shall be exercisable "only with the consent of the "Secretary of State, . . . (i) power to "grant leave of absence to the patient "under section 39 of this Act; (ii) "power to transfer the patient in "pursuance of regulations under "section 41 of this Act; and (iii) "power to order the discharge of the "patient under section 47 of this "Act; and if leave of absence is "granted . . . the power to recall "the patient . . . shall be vested in the "Secretary of State as well as the "responsible medical officer; . . ."

S. 72: "(1) If in the case of "a person serving a sentence of "imprisonment the Secretary of State "is satisfied, . . . (*a*) that the . . . "person is suffering from mental ill- "ness, . . . and (*b*) that the mental "disorder is of a nature or degree "which warrants the detention of the "patient in a hospital for medical "treatment; the Secretary of State "may, . . . by warrant direct that "that person be removed to and "detained in such hospital . . . as "may be specified in the direction. ". . . (3) A transfer direction with "respect to any person shall have the "like effect as a hospital order made "in his case."

S. 97: "(1) The Minister shall pro- "vide such institutions as appear to "him to be necessary for persons sub- "ject to detention under this Act . . . "who . . . require treatment under "conditions of special security. . . ."

on a chronic anxiety state, which had substantially impaired his mental responsibility for his act. The judge, taking the view that it was for the defence alone to raise the issue of insanity, refused to allow the prosecution to call evidence in rebuttal to show that the defendant was insane within the M'Naughten Rules, but doctors did give evidence for the prosecution which clearly showed that they thought that the degree of the defendant's mental illness was more than his own doctors had spoken to. After the defendant was convicted, the judge was invited by the defence to make a hospital order under section 60 of the Mental Health Act, 1959, and, if necessary, a restriction order under section 65 of that Act. Evidence was given by the defendant's doctors, who were qualified under the Act to give the necessary evidence, that the defendant needed medical treatment in a hospital and that arrangements had been made to admit him to a local hospital. The judge declined to make a hospital order and, sentencing the defendant, said: "You killed your wife quite "deliberately, but the jury have found, and I agree with their "verdict, on the evidence put before them that at the time "you were suffering from some abnormality of mind which diminished your responsibility for that act, but still it remains a "very serious matter that you killed her. I am not at all sure "that your mental state is not even worse than that, at any "rate, I am not going to have the responsibility of setting you "anywhere near liberty. I am going to pass such a sentence "on you as will involve you being entirely in the hands of the "Secretary of State for Home Affairs, who has complete powers "to send you to the right place. I can only send you to prison, "and maybe prison is not the right place for you, I do not know "the way it will be decided; but the only way I can do that effectively is to pass a sentence, which means you may not be out "altogether, but which is a sentence of imprisonment for life."

The appellant appealed against that sentence on the ground that it was too severe and that in view of the wide powers given to the court by the Mental Health Act, 1959, it was wrong in principle.

Breuan Rees for the appellant. In view of the wide powers conferred on the court by the Mental Health Act, 1959, it is now wrong in principle to pass a sentence of life imprisonment where the purport of that sentence is to give the Secretary of State powers to deal with the convicted person. There might be cases where the nature of the offence is such that the judge considers that it demands a sentence of imprisonment, but in this case the appellant's condition is susceptible to treatment and the only matter of public importance is his rehabilitation. This sentence means that after his mental disorder is cured he can be returned to prison. The inference from the evidence is that the appellant is not a danger to the public, and the judge could have achieved his object better by making a hospital order under section 60 together with a restriction order under section 65. When the latter order is made, the subject of it is nowhere near his liberty.

Alternatively, in the circumstances, the sentence was too severe.

Sir Reginald Manningham-Buller Q.C., A.-G. and *J. R. Cumming-Bruce* as amici curiae. Section 60 gives a judge a complete discretion and enlarges rather than restricts his powers. But subsection (3) provides that a hospital order may not be made unless the court is satisfied that arrangements have been made for the admission of the offender to the hospital specified in the order. Before making an order the judge, under subsection (1) (*b*), must also be satisfied that to make a hospital order is the most suitable method of disposing of the case; that clearly requires that he should be satisfied that admission to the particular hospital at which arrangements have been made is the most suitable method of dealing with the offender. If, therefore, the judge considered that the appellant should receive treatment under conditions of special security in a special hospital (see section 97) he had no power to make an order specifying the local hospital. The judge clearly considered that the appellant's mental condition was serious and if he was not satisfied that the local hospital was the right place for the appellant he had no alternative but to pass a sentence of imprisonment.

Moreover, the judge might have considered that the nature of the offence was such that it demanded a sentence of imprisonment. Diminished responsibility does not mean that there is no responsibility for the offence. Where a hospital order is made, there is no power to transfer to prison after the mental condition is cured, and even where there is a restriction order the offender may be released at any time by the Secretary of State.

The ruling of the court is sought on the question whether, when there is a plea of diminished responsibility or insanity, it is open to the prosecution to call evidence in rebuttal of that plea to show that the degree of mental incapacity is different from the degree put forward by the defence. That course was taken by Donovan J. in *Reg.* v. *Bastian*,[2] by Elwes J. in *Reg.* v. *Nott*[3] and by Paull J. in *Reg.* v. *Grant.*[4]

[LORD PARKER C.J. In a recent case before me I was told that that was the course taken in other cases and the trial proceeded on that basis without any argument on the matter.]

Those cases were not brought to the attention of the judge in this case, and it is submitted that he was wrong in refusing to allow the prosecution to call evidence of insanity. The practice has always been that insanity could only be raised by the defence, but since the Homicide Act, 1957, has provided a defence of diminished responsibility it is submitted that once the defence has put mental capacity in issue it is right that the prosecution should be able to contest the degree of incapacity.

[LAWTON J. There is a serious practical difficulty. In a case where a defendant denies that he committed the act alleged but pleads that if he did he was suffering from diminished responsibility, and the prosecution prove that he was guilty but insane, the defendant is deprived of his right of appeal against the finding that he committed the act.]

That is a serious consequence but it is not so serious as it would be for a jury to return a verdict of diminished responsibility—partial insanity—when in fact the defendant is insane. The court is under a duty to arrive at the truth. By a plea of diminished responsibility or insanity the defence voluntarily raises the issue of mental capacity. Once it is in issue the court cannot prohibit an inquiry into the nature of the defendant's mental capacity, but must seek to arrive at the right verdict on the facts.

[LORD PARKER C.J. This point is only on the borderline of this case. A binding decision of this court could only arise where, on a plea of insanity, the jury find diminished responsibility. It might therefore be better if we said nothing about it.]

It was thought desirable to bring the matter to the attention of the court so that uniformity of practice might be achieved.

Rees replied.

LORD PARKER C.J. The appellant was indicted at the Glamorgan Assizes for the murder of his wife, a woman 72 years of age. He was convicted of manslaughter on a plea of diminished responsibility, and was sentenced by Jones J. to life imprisonment.

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[2] [1958] 1 W.L.R. 413; 42 Cr. App.R. 75; [1958] 1 All E.R. 568n.

[3] (1958) 43 Cr.App.R. 8.

[4] [1960] Cr.L.R. 424.

He now appeals against that sentence by leave of the court, the question being whether that sentence was wrong in principle having regard to the court's powers under the Mental Health Act, 1959.

So far as the facts are concerned, it is sufficient to say that this unfortunate husband killed his wife, who had been seriously ill. In many ways it could be classed as a mercy killing. The unchallenged evidence, so far as the defence doctors were concerned, was that the appellant was suffering from depression superimposed on a chronic anxiety state which had substantially impaired his mental responsibility. They gave evidence—and they were doctors who came within the definition of doctors qualified to speak on these matters under the Mental Health Act, 1959—that he required mental treatment, and evidence was given that a vacancy was available in a local Welsh hospital. The judge, however, despite that being pressed upon him, sentenced the prisoner to life imprisonment, saying: "I am not at all sure that "your mental state is not even worse than that, at any rate, I "am not going to have the responsibility of setting you anywhere "near liberty. I am going to pass such a sentence on you as will "involve you being entirely in the hands of the Secretary of "State for Home Affairs, who has complete powers to send you "to the right place."

It is agreed that under section 72 of the Mental Health Act, 1959, the Secretary of State has ample powers, but the argument is that, having regard to the court's powers under section 60, the court in its discretion ought to have dealt with the appellant under that section. So far as it is material, the section provides: "Where . . . (*a*) the court is satisfied, on the written or oral "evidence of two medical practitioners (complying with the "provisions of section 62 of this Act)—(i) that the offender is "suffering from mental illness . . . and (ii) that the mental "disorder is of a nature or degree which warrants the detention "of the patient in a hospital for medical treatment, . . . and "(*b*) the court is of opinion"—and this is where the discretion of the court lies—"having regard to all the circumstances "including the nature of the offence and the character and antecedents of the offender, and to the other available methods of "dealing with him, that the most suitable method of disposing "of the case is by means of an order under this section, the "court may by order authorise his admission to and detention in "such hospital as may be specified in the order." By section 65 the court has power to make at the same time what is called a restriction order which will restrict the discharge of the prisoner from hospital for such period as is stated in the restriction order except with the consent of the Secretary of State.

It seems to this court that, although the discretion there laid down is very wide indeed, the basic principle must be that in the ordinary case where punishment as such is not intended, and where the sole object of the sentence is that a man should receive mental treatment and be at large as soon as he can safely be discharged, a proper exercise of the discretion demands that steps should be taken to exercise the powers under section 60, and that the matter should not be left to be dealt with by the Secretary of State under section 72. That, as it seems to the court, is the general principle. Of course there may be cases where, although there is a substantial impairment of responsibility, the prisoner is shown on the particular facts of the case nevertheless to have some responsibility for the act he has done, for which he must be punished, and in such a case, although as the court reads the sentence imposed by the judge this was not such a case, it would be proper to give imprisonment allowing the Secretary of State to exercise his powers under section 72 in order that any necessary mental treatment should be given. Prima facie, therefore, it looks as if, as Mr. Rees has contended, this sentence was wrong in principle, in that it seems to this court that the judge was not intending to impose punishment. But what happened in this case was that the Crown sought to call rebutting evidence in regard to diminished responsibility, the form of the rebuttal being that the doctors for the Crown were going to say that the appellant was not merely suffering from diminished responsibility but was insane within the M'Naughten Rules. However, unlike the course taken by some judges, this judge in fact refused to allow that issue of insanity under the M'Naughten Rules to be raised. Nevertheless, the doctors for the Crown did give evidence which showed that they clearly thought that the degree of mental trouble from which the appellant suffered was a great deal more than that to which his own doctors had spoken. It seems to the court that the anxiety of the judge was really that he felt that the mental condition of the appellant might be far worse than that spoken to by his doctors, and that he ought to be treated in a special hospital, what might be called a secure hospital, where very special steps are taken to see that the inmate could not get out and could not be at large. There are special hospitals within the meaning of the Act which are qualified for that purpose. We have been told that Moss Side, Rampton and Broadmoor are special hospitals, but the only evidence before the judge was that there was a vacancy in this local Welsh hospital, and he was clearly not satisfied that that local Welsh hospital was secure enough to enable him to take the risk of making a hospital order naming that hospital. Accordingly, having had no evidence of a vacancy in a special hospital, it seems to this court that it was a perfectly proper exercise of the judge's discretion in the special circumstances of this case to say: "Although I do not intend this as punishment, "I am not going to take the responsibility of putting this man in "the local Welsh hospital where he can become at large, and "I think it is better to leave it entirely to the Secretary of State." The court feels that there is no ground for interfering with the exercise of the judge's discretion. It certainly is not wrong in principle on the special facts of this case and, accordingly, this appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Treasury Solicitor.*

J. F. L.

C. A.

1961
May 17, 18.

Holroyd Pearce, Upjohn and Donovan L.JJ.

SANDERSON *v.* NATIONAL COAL BOARD.

[Plaint No. Q. 878.]

Mines—Act of 1954—*Breach of statutory duty—Practicability of precautions—"Parts and working gear"—Patent defect in conveyor belt—Workman injured—"Shall be . . . free from patent defect"—Duty absolute—Meaning of "patent"—Objective test—Onus on employers of showing impracticability of avoiding or preventing contravention—Mines and Quarries Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 70), *ss.* 81 (1), 157.

A miner working by only his cap light in a confined space beside a moving conveyor was injured when one or more of the conveyor belt hooks came adrift and lacerated his leg. His shouts for help were unheard by the beltman, whose responsibility it was to look for defects in the belt and stop the conveyor if he observed anything wrong. The plaintiff brought an action against the National Coal Board, claiming damages for negligence and breach of the duty under section 81 (1) of the Mines and Quarries Act, 1954,[1] requiring that "all parts and working gear . . . shall be "free from patent defect. . . ." At the trial the board conceded that the defect in the belt was patent, but they relied on section 157, contending that it was "impracticable to avoid or prevent "the contravention" of the provisions of section 81 (1). The trial judge held that the accident had happened without negligence or fault on the part of anyone, and that though the board were in breach of section 81 (1) they were not liable, since the plaintiff had failed to prove that the defect in the belt existed for four or five minutes before he was injured and therefore the board had proved that it was impracticable for them to avoid or prevent the admitted contravention; and he dismissed the claim.

On appeal by the plaintiff, the board contended that the defect in the belt was not "patent" because there was no one who could have seen or remedied it in time to prevent the accident:—

Held, allowing the appeal, (1) that "patent" in section 81 (1) must be construed objectively and means "observable" and not merely "observed."

(2) That, accordingly, immediately the defect existed there was a contravention of the absolute duty imposed on the employers by section 81 (1).

(3) That section 157 placed the onus of proving "impracticability" on the board and not on the plaintiff and that onus had not been discharged.

Per Donovan L.J. The boundaries of practicability are wider than the boundaries of reasonable care.

Hamilton v. *National Coal Board* [1960] A.C. 633; [1960] 2 W.L.R. 313; [1960] 1 All E.R. 76, H.L. and *Edwards* v. *National Coal Board* [1949] 1 K.B. 704; 65 T.L.R. 430; [1949] 1 All E.R. 743, C.A. applied.

Brown v. *National Coal Board* [1961] 1 Q.B. 303; [1960] 3 W.L.R. 892; [1960] 3 All E.R. 594, C.A. distinguished.

APPEAL from Judge Ould, sitting at Wakefield County Court.

The plaintiff, James Arthur Sanderson, was employed as a packer in the colliery of the defendants, the National Coal Board. He was working with a mate underground at the face of a seam

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[1] Mines and Quarries Act, 1954, s. 81 (1): "All parts and working "gear, whether fixed or movable, in"cluding the anchoring and fixing "appliances, of all machinery and "apparatus used as, or forming, part "of the equipment of a mine, and all "foundations in or to which any such "appliances are anchored or fixed "shall be of good construction, suit"able material, adequate strength and "free from patent defect, and shall be "properly maintained."

S. 157: "It shall be a defence in "any legal proceedings to recover "damages and in any prosecution, in "so far as the proceedings or prosecu"tion are or is based on an allegation "of a contravention, in relation to a "mine or quarry, of—(*a*) a provision "of this Act, or an order made there"under or of regulations (not being a "provision which expressly provides "that a person is to be guilty of an "offence); . . . to prove that it was "impracticable to avoid or prevent the "contravention."

2 ft. 6 in. high branching off from the main gate. The only light was his cap light. A conveyor was moving gradually along the face where he was working towards the main gate where the main conveyor ran outby. He was packing with stones brought on the face conveyor that ran beside him. One or more of the hooks which joined together the 60 segments of the conveyor's 260 yards of endless belt came unfastened and projected, so that, as the conveyor went past the plaintiff where he crouched, they caught his leg and dragged him. There was, or should have been, a beltman at the junction of the face conveyor and the main conveyor, but the plaintiff's shouts were unheard. The conveyor was therefore allowed to run unchecked. The plaintiff had to hold on to an upright to stop himself being dragged towards the rollers at the end of the face conveyor, and the hooks were thus torn out of his leg, causing injury.

He brought an action against the board, claiming damages for negligence and breach of statutory duty. His case, supported by his evidence and that of his fellow-packer, was that the beltman was not at his post at the end of the face and main conveyors. The board's case was supported by a deputy and the beltman. According to the beltman's evidence, he had been doing his duty; it would have been very wrong for him to leave the belt. Part of the beltman's work was to look for defects in the belt. If he saw anything suspicious or any loose hook, he always stopped the belt. Sometimes, he said, he had to turn away from the belt, as his eyes could not look at it all the time without straining them. According to the board's evidence, the condition of the belt after the accident, apart from hooks sticking out, was satisfactory. The plaintiff admitted that hooks came loose regularly. If they were not too bad, he said, the beltman cut the corner off the belt where they had come loose and let the belt go on. It was the beltman's job to repair the belt.

The county court judge accepted that the belt was in satisfactory condition, but it was conceded at the trial by counsel for the board that projection of the hooks was a patent defect under section 81 (1). The judge found that common law negligence was not proved, and against that finding there was no appeal. He found that the defendants were in breach of section 81 (1) of the Mines and Quarries Act, 1954, but that they escaped liability by virtue of section 157. As to the disputed facts, the judge said: "There were two witnesses against two witnesses, and on the "material parts of the evidence, the witnesses clashed violently. "On the disputed matters, the plaintiff has failed to satisfy me.

" I cannot say one way or the other who is lying. I do not know " which side to believe."

On the defence under section 157, the county court judge said: " The evidence is quite clear—indeed, it is common ground—that " this belting may for various reasons causing undue strain come " adrift at any time without negligence on the part of anybody " and without any warning. There may be belts which only come " apart if they are not properly maintained, but that is not this " case. I therefore rule that the defendants have proved that it " was impracticable to avoid or prevent the breach. They get " the benefit of the section immediately, because it is common " ground that this occurrence can happen without fault on any- " body's part. If, however, the plaintiff could show that the " defect existed, say, for four or five minutes before he was " injured, the defendants would lose the benefit of section 157, " because while they could not prevent the defect happening, " they should prevent its continuing. That the plaintiff cannot " show on the evidence. Therefore, although there is a prima " facie breach of section 81 (1), the defence under section 157 " succeeds."

The plaintiff appealed.

P. Stanley Price Q.C. and *A. W. Lyon* for the plaintiff. Once it was conceded by the board at the trial that the plaintiff was injured by a " patent defect " in the working gear, there was a contravention of the absolute obligation in section 81 (1) of the Act of 1954, and the county court judge erred in holding that in that situation the board had discharged the onus placed on them under the " escape clause," section 157, by establishing that the hooks in this belt often did and could break loose without warning and without negligence on the part of anyone, for the board are in the position of " insurers " under section 81 (1), and cannot divest themselves of that status and obtain the benefit of section 157 unless they establish that it was " impracticable " to prevent or avoid the contravention: see *per* Viscount Simonds in *Hamilton* v. *National Coal Board,*[2] and Tucker L.J. in *Edwards* v. *National Coal Board,*[3] dealing with a similar absolute duty under the Coal Mines Act, 1911. Under that Act the standard of proof laid on the employers varied in relation to criminal and civil proceedings, which were dealt with by different subsections: the " escape " clause from criminal proceedings required them to show that it was "impracticable" to avoid the contravention; in civil proceedings the lower standard of "not reasonably practicable" was imposed. It is significant that in the new Act of 1954 there is only one standard for criminal and civil proceedings, namely, "impracticable," which shows that the legislature has tightened the civil standard. The board here had to establish, not the possibility of an accident happening without negligence, but that on balance of probability it was impracticable to prevent it. They have not done so, and the judge has incorrectly equated absence of negligence with the affirmative proof of impracticability required before the board can have the benefit of section 157. Further, section 44 of the Act requires constant supervision of a conveyor belt by a competent male person. The board could have directed evidence to that matter. The inspection of the belt was the duty of the beltman. The plaintiff's case was that the beltman had left his post; the defence was that he was there. The judge refused to make any finding on that. If a judge is unable to reach a finding of fact on the evidence or if there was any doubt about where the beltman was, the misfortune, on ordinary principles, falls on the party on whom lies the burden of proof, that is, on the board, under section 157. *Brown* v. *National Coal Board*[4] is distinguishable, for the nature of the statutory duty there was qualified. [*Caswell* v. *Powell Duffryn Associated Collieries Ltd.*[5] was also referred to.]

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[2] [1960] A.C. 633, 639; [1960] 2 W.L.R. 313; [1960] 1 All E.R. 76, H.L.

[3] [1949] 1 K.B. 704, 710; 65 T.L.R. 430; [1949] 1 All E.R. 743, C.A.

R. Marven Everett Q.C. and *J. R. Pickering* for the board. The concession of the board at the trial was that there was prima facie a defect in the belt, patent *to the plaintiff*. That qualification admits of the submission on appeal that, having regard to the fact that if there is a breach of section 81 (1) criminal proceedings may follow, "patent" means "patent to the appropriate "person or class of persons who could observe the defect if it "was his duty to do so and to take steps about it." A latent defect does not constitute a breach of section 81 (1), and a latent defect may become patent without carelessness or negligence. There is no breach of section 81 (1) until a patent defect has existed for sufficient time to give an opportunity for something to be done about it. *Hamilton* v. *National Coal Board*[6] is distinguishable on its facts. The onus on the plaintiff is to establish the breach and that it was probably the cause of his injury.

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[4] [1961] 1 Q.B. 303; [1960] 3 W.L.R. 892; [1960] 3 All E.R. 594, C.A.

[5] [1940] A.C. 152; 55 T.L.R. 1004; [1939] 3 All E.R. 722, H.L.

[6] [1960] A.C. 633.

[HOLROYD PEARCE L.J. He has done that. He has shown a breach of the "warranty," as Viscount Simonds described it in *Hamilton's* case.[7]]

He has not established that there was a breach, for on the evidence this was a defect which developed at such time after the last time when the belt passed the beltman that it would not have become "patent" for the purposes of section 81 (1) until the belt came round again and into the vision of the person whose duty it was to observe it and see to it. *Brown* v. *National Coal Board*[8] and *Bonnington Castings Ltd.* v. *Wardlaw*[9] are relied on to show the onus on the plaintiff in this case.

If there has been a contravention, section 157 provides an escape for the board on the ground of impracticability, for what has to be proved is impracticability in relation to the breach itself and not the prevention of damage. The judge's finding that the hooks come adrift at any time and without negligence is equivalent to a finding that it could not be avoided, that it was impracticable to avoid the contravention; and once that is established, the burden is returned to the plaintiff to show that the board could have prevented the contravention which injured him.

[HOLROYD PEARCE L.J. No; the onus is never thrown back on the plaintiff.]

In any event there was ample evidence here on which the judge could conclude that it was impracticable to do anything about the belt.

P. Stanley Price Q.C. in reply. The attempt to introduce a subjective element into the construction of "patent" is doomed to failure. "Patent" and "latent" must relate to an objective standard, namely, what is observable, what exists; and it must be wrong to say that a hook which starts to stick out of a belt is not "patent" until some later time in the revolution of the belt. Apart from the English language, there are two conclusive reasons why the subjective construction is wrong: (1) If it were right, this defect would be "patent" when the hook was at the gearhead and "latent" when it went down the face. That is absurd. (2) Section 80 of the Act requires every man working underground to take action about anything that amounts to a defect in working apparatus if he becomes aware of it; he cannot leave the defect until it comes round into the field of vision of the beltman whose duty it is to notice it, so that "patent" does not mean observed

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[7] [1960] A.C. 633, 638.

[8] [1961] 1 Q.B. 303.

[9] [1956] A.C. 613; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615, H.L.

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by the person who ought to do something about it. In any event there is no room in the present case for argument that this was not a patent defect, for that was conceded at the trial.

Holroyd Pearce L.J. stated the facts set out above, and said that so far as the disputed facts were concerned, nothing had been proved by either side. It was equally possible that the beltman was absent and negligent or that he was present and doing his duty. His Lordship continued: The material words of section 81 (1) of the Act are as follows: " All parts and working gear . . . " shall be of good construction, suitable material, adequate " strength and free from patent defect, and shall be properly " maintained." The material words of section 157 are: " It shall " be a defence in any legal proceedings to recover damages . . . " in so far as the proceedings . . . are . . . based on an allegation " of a contravention, in relation to a mine or quarry, of —(*a*) a " provision of this Act, . . . to prove that it was impracticable " to avoid or prevent the contravention."

The judge was right in holding that the plaintiff had proved injury caused by a breach of section 81 (1). It was argued before us by the defendants that the plaintiff had failed to prove that his injury was caused by a breach, for the hook might have broken loose immediately before the accident and there would then, at the moment of the accident, have been no patent breach, since there was no-one who could have seen it and there was no practical possibility of remedying it. A defect, it is argued, is not patent when there was no-one to see it. It was not proved by the plaintiff that there was any appreciable interval between the extrusion of the hook and the accident, and it is said that unless it was proved that there was time for anyone to observe or mend the hook, the defendants are not liable.

Reliance was sought to be placed on *Brown* v. *National Coal Board.*[1] But that case is not comparable, for it dealt with the position under another section which lays on the manager personally a duty to take steps. Such a personal duty involves a different conception from the impersonal unqualified provision that all working gear shall be free from patent defect and shall be properly maintained.

In *Hamilton* v. *National Coal Board*[2] the House of Lords held that liability under section 81 (1) was absolute. Lord

[1] [1961] 1 Q.B. 303; [1960] 3 W.L.R. 892; [1960] 3 All E.R. 594.

[2] [1960] A.C. 633; [1960] 2 W.L.R. 313; [1960] 1 All E.R. 76.

Simonds said[3]: "This is what is sometimes called an absolute "obligation"; and later: "The word 'absolute' in this con- "nection has become part of the dictionary of the law. Some- "times the word 'continuing' is substituted for it. Either "word means that, in effect, the employer warrants that the "machine or other equipment which he is obliged to maintain "will never be out of order. It is, no doubt, a difficult con- "ception, but the employer has his refuge in the escape section "of the relevant Act, so far as it applies." Therefore, as soon as there is a patent defect, there is automatically a breach of statutory obligation or, as it were, breach of warranty. That breach starts when the defect becomes patent and continues until the defect is remedied. There is no room in that conception for a period of grace during which someone can observe or mend the defect. It is a notional breach without reference to negligence or reasonableness or practicability. The notion of practicability is only introduced when section 157 has been brought into force. A patent defect is not latent when there is none to observe it. The natural meaning of the word "patent" is objective, not subjective. It means "observable," not "observed." A patent defect must be apparent on inspection, but it is not dependent on the eye of the observer; it can blush unseen. In this case, although the defect was in darkness, it was patent. Had the plaintiff or his mate shone their lamps on it at the relevant moment, they would have seen it.

The construction of the word "patent" for which the defendants contend involves the conclusion that a patent defect at the belt head becomes a latent defect immediately it has turned over the rollers and is making its hidden journey in the darkness, and that it is intermittently latent or patent according to its position. Such a construction is unreasonable and would severely limit the protection given by section 81 (1) in a way that Parliament cannot have intended.

The judge was right, therefore, in holding that the plaintiff had established his prima facie right of action for breach of section 81 (1). But I cannot, with all respect, accept his reasoning in respect of section 157. He said: "The evidence is quite clear— "indeed it is common ground—that this belting may for various "reasons causing undue strain come adrift at any time without "negligence on the part of anybody and without any warning. "There may be belts which only come apart if they are not

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[3] [1960] A.C. 633, 639.

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"properly maintained, but that is not this case. I therefore "rule that the defendants have proved that it was impracticable "to avoid or prevent the breach. They get the benefit of the "section immediately because it is common ground that this "occurrence can happen without fault on anybody's part. If, "however, the plaintiff could show that the defect existed, say, "for four or five minutes before he was injured, the defendants "would lose the benefit of section 157, because while they could "not prevent the defect happening, they should prevent its "continuing. That the plaintiff cannot show on the evidence. "Therefore, although there is a prima facie breach of section "81 (1) the defence under section 157 succeeds."

The judge, with all respect, erred in saying that the plaintiff had, for the purposes of section 157, to show that the defect existed, say, for four or five minutes before he was injured. He did not have to show anything. The onus was on the defendants; and they had proved nothing, save that such an accident could have happened without their negligence. The mere fact that an accident may have happened in a way which it was impracticable to avoid is beside the point. It is true that it may have happened so. But they had to prove that it probably happened so, and they have not done that. It is equally possible that the beltman was absent from his post and therefore failed to see the hook which he would otherwise have seen and remedied. It is equally possible that better arrangements could have been made. The evidence of impracticability is not strong, even had the judge believed the defendants' witnesses; but he did not. To get the valuable benefit of section 157, the defendants must prove that it was impracticable to avoid the contravention. That is a matter which must be proved by evidence, not deduced by casual inference.

In *Edwards* v. *National Coal Board*[4] Tucker L.J. said: "It "was, I think, a heavy burden. They [the National Coal Board] "occupied a position between that of an absolute insurer and the "ordinary occupier of property, but they start as insurers, and "have by evidence to divest themselves of this status." In the present case the defendants have proved nothing which could divest them of that status. I would therefore allow the appeal.

UPJOHN L.J. I agree with the judgment that has just been delivered, and do not desire to add anything.

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[4] [1949] 1 K.B. 704, 710; 65 T.L.R. 430; [1949] 1 All E.R. 743, C.A.

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DONOVAN L.J. I also agree. It was conceded at the trial that the protruding hook or hooks constituted a defect patent to the plaintiff. I think this was a proper and, indeed, unavoidable concession; and if the defect were patent to the plaintiff, it was equally patent to any informed person who chose to look at or examine the belt. The test here, I think, is purely objective. There was thus a breach of the absolute obligation imposed by section 81.

To avoid the consequences, the defendants have to show, under section 157, that it was impracticable to avoid or prevent the contravention. In terms of this case, that means that it was impracticable to prevent the hook or hooks in question from protruding and remain protruding as they did on this occasion. The defendants never began to prove that. The most that they established was that they were not negligent; that is, that they took all reasonable care. But the boundaries of practicability are wider than the boundaries of reasonable care; and over the boundaries of reasonable care the defendants never by their evidence tried to go. They may well be able to do so in some future case. It is too late to do so in this.

Appeal allowed with costs.
Judgment for the plaintiff for £100,
with costs in the court below.
Leave to appeal refused.

Solicitors: *Corbin, Greener & Cook for Raley & Pratt, Barnsley; Donald H. Haslam for C. M. H. Glover, Doncaster.*

M. M. H.

KNIGHT v. LEAMINGTON SPA COURIER LTD.

[Plaint No. Q. 575.]

C. A.
1961
May 15, 16.

Holroyd Pearce, Upjohn and Donovan L.JJ.

Factory—Dangerous machinery (fencing)—"Motion or in use," in—Cleaning — Inching button — Printing machine being cleaned — Motion produced by electrical power controlled by manually operated inching button—Machine running at slow speed for cleaning purposes—Whether machine "in motion or in use"—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 14, 16, 20—*Operations at Unfenced Machinery Regulations*, 1938 *and* 1946 (*S.R. & O.* 1938, *No.* 641 *and S.R. & O.* 1946, *No.* 156).

The Factories Act, 1937, provides by section 16: "All fencing "or other safeguards . . . shall be . . . maintained and kept in position while the parts required to be fenced or safeguarded are in "motion or in use, except when any such parts are necessarily "exposed for examination and for any lubrication or adjustment "shown by such examination to be immediately necessary. . . ."

An experienced press operator, in order to clean the blanket rollers of a printing press with a rag and petrol between printing times, lifted the guard which normally covered the roller and stop-press housing to get access to the parts to be cleaned. He turned the rollers by pressing an inching button with one hand, thereby bringing into operation the electrical motive power which caused the dangerous parts to revolve very slowly and only so long as the button was actually being pressed. While pressing the button with one hand, the operator allowed the finger of the other hand to be drawn with the rag into the potentially dangerous nip, and, having failed to take his other hand off the button, he sustained injury to his finger. During normal printing operations the press was operated by another button which caused it to revolve continuously at very high speed.

The operator brought an action against his employers claiming damages for, inter alia, breach of the duty under section 14 (1) of the Factories Act, 1937,[1] to fence securely every dangerous part of any machinery. The county court judge found that the parts in question were dangerous but held that as during the cleaning process they were not "in motion or in use" within section 16, the claim failed. On appeal:—

Held, dismissing the appeal, that the trial judge had rightly held that the movement of this machine by means of an inching device, albeit involving electrical motive power, was not "motion" or "use" within section 16. The question whether any particular movement of a machine was within section 16 was one of fact and degree. The words "in motion or in use" normally connoted, and should be limited to, the substantial movement of a machine's normal working or some movement reasonably comparable to such normal working (including preparatory purposes which might involve running a machine at high speeds); but the slow sporadic rotation or intermittent movement of machinery, whether effected by manpower or mechanical power, intended to place it more advantageously for cleaning or repair, was not normally "motion" or "use" within section 16.

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[1] Factories Act, 1937, s. 14 (1): "Every dangerous part of any "machinery, other than prime movers "and transmission machinery, shall "be securely fenced unless it is in "such a position or of such construction as to be as safe to every person "employed or working on the premises "as it would be if securely fenced: ". . ."

S. 16: "All fencing or other safe-"guards . . . shall be of substantial "construction, and constantly maintained and kept in position while "the parts required to be fenced or "safeguarded are in motion or in use, "except when any such parts are "necessarily exposed for examination "and for any lubrication or adjust-"ment shown by such examination to "be immediately necessary, and all "such conditions as may be specified "in regulations made by the Secretary "of State are complied with."

S. 20: "A woman or young person "shall not clean any part of a prime "mover or of any transmission "machinery while the prime mover "or transmission machinery is in "motion, and shall not clean any "part of any machine if the cleaning "thereof would expose the woman or "young person to risk of injury "from any moving part either of "that machine or of any adjacent "machinery."

Further, though the Operations at Unfenced Machinery Regulations, 1938 and 1946, referred to movement by an inching device in terms which appeared to contemplate that there might be movement by such a device which might put dangerous parts of machinery "in motion" so as to render such movement with the guard removed unlawful, nothing in the wording of those regulations compelled a decision on the present facts in favour of the plaintiff.

Richard Thomas & Baldwins Ltd. v. *Cummings* [1955] A.C. 321; [1955] 2 W.L.R. 293; [1955] 1 All E.R. 285, H.L. followed.

APPEAL from Judge Hamilton, sitting at Nuneaton County Court.

The facts, as stated by Holroyd Pearce L.J., were as follows: The plaintiff, Edward William Knight, was an assistant press operator at the defendants' factory, a newspaper-printing press. He had operated an electrically-driven printing press for two years. When no printing was being done, he took the opportunity to clean the blanket on the printing roller. He lifted the guard from the roller to get access to it, and took a rag dipped in petrol. The roller had an inching button which caused it to revolve at a very slow speed, five revolutions a minute, for as long as the button was actually being pressed. By this means it was possible to turn the roller as little as an inch at a time to reach various portions of it for cleaning. Above and to the side of the roller was the stop-press housing which also revolved slowly and thus, together with the roller, produced a nip which was dangerous to anyone who put his finger near enough. It was admitted that this was a dangerous part of the machinery. The operator knew of the danger. He cleaned part of the surface of the roller and he wished to get at another part. While pressing the button, he allowed his finger to be drawn in, either by placing it on the moving roller or by letting it be drawn in with the rag, and failed to take his other hand off the button in time. He brought an action against his employers for the injury to his finger thereby sustained, claiming damages for negligence and breach of statutory duty.

The employers denied negligence, and, alternatively, pleaded contributory negligence by the operator. The county court judge

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dismissed the claim based on negligence and also that based on the alleged breach of section 14 (1) of the Factories Act, 1937, relying on the decision in *Richard Thomas & Baldwins Ltd.* v. *Cummings*,[2] and holding that though the relevant parts of the machinery were dangerous they were not "in motion or in use" within section 16, and therefore there was no duty to fence securely at the time the operation of cleaning was being carried out. The plaintiff appealed against the decision on the alleged breach of statutory duty.

A. E. James Q.C. and *Iain Black* for the plaintiff. This machine was at the time of the accident "in motion" and "in use," its dangerous parts were not fenced, and it is therefore caught by section 16. The only section which deals with cleaning a machine is section 20, prohibiting cleaning by a woman or young person; but that does not assist in construing sections 14 and 16; it does not follow that a male adult can clean a machine, no matter how dangerous its parts or at what speed it may be running, without a guard; and no regulations have been made in relation to cleaning machines which might relax the stringent requirements as to fencing in the Act. It is inconceivable, where the purpose of the Act is to protect workmen, that there should be a complete removal of that protection for cleaning.

For the construction of the words "in motion or in use" the Operations at Unfenced Machinery Regulations, 1938 and 1946, are relied on, for they lay down a code giving some latitude in respect of movement by inching buttons similar to the relaxation afforded by section 16 in respect of examination, lubrication and adjustments found to be immediately necessary. There would be no need for the provision in the regulations in regard to inching devices unless such movement of the machine was, in the view of the legislature, "motion or use" of the machine: see regulations 1 and 9.

This machine was "in use," for the evidence showed that the inching button was also used to make short movements for threading paper. The county court judge decided that this machine was not within the section "in motion or in use" by applying the reasoning and principle of the decision in *Richard Thomas & Baldwins Ltd.* v. *Cummings*.[2] "In use" was not argued in *Cummings'* case,[2] and it is distinguishable on its facts, for it dealt with transmission machinery and not dangerous parts of machinery; it related to an isolated act of turning the blade in the course of repair when the machine had been out of use for some time, and it was being operated manually and not by mechanical or electrical power. Here the machine was running in the normal way in that it is designed to run at two different speeds by operating two different buttons. It was running by means of electrical power so that it was running normally by the device provided. The cleaning process is done almost daily and involves men in the operation of using the inching button to turn rollers while the guards are not in position and the power is on, and it was being used to make the rollers fit to produce the necessary print. Although *Cummings'* case [2] is distinguishable on its facts, much that was said by their Lordships is relevant here: see *per* Lord Oaksey,[3] referring to section 10 (1) (*d*) of the Factory and Workshop Act, 1901, which covered cleaning and repair operations, now omitted from the Act of 1937; *per* Lord Porter and *per* Lord Reid.[4]

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[2] [1955] A.C. 321; [1955] 2 W.L.R. 293; [1955] 1 All E.R. 285, H.L.

On a consideration of the pattern of sections 12, 13 and 14, and the Unfenced Machinery Regulations, there was here "motion" within section 16 and guards should have been provided. It is no answer that that would make cleaning difficult or even impossible. The ruling of the court is desired on the construction of "in motion or in use" in relation to this sort of work. Here the workman said that he knew it was dangerous to have his hand in that position, so that some blame would fall on him; but where the statutory protection is provided, it would only be in exceptional circumstances that the court would lay the whole fault on the workman; and where the practice is to have parts in motion, albeit slow motion, with the guards down, there is no escape from liability for a breach of section 16.

John Thompson Q.C. and *E. Brian Gibbens* for the employers. The county court judge correctly applied the reasoning and decision in *Richard Thomas & Baldwins Ltd.* v. *Cummings*,[5] for they cover this case. This machine was not "in use"; it was being prepared for use. Loading a machine with paper and cleaning it are not "using" it. This inching button was incorporated for the purpose of doing exactly what this workman was doing. *Cummings'* case [5] was decided on the basis that small movements of this kind were not such "motion" as section 16

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[2] [1955] A.C. 321.

[3] Ibid. 328.

[4] Ibid. 331–332, 333–334.

[5] Ibid. 333–334.

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contemplated, and that "use" was the normal productive user or the normal movement of the machine in productive user.

[UPJOHN L.J. If "motion" means normal motion, it is difficult to see any difference between "motion" and "use."]

This machine was not in use, and the only question is whether it was in motion.

[DONOVAN L.J. But can that question be solved in every case by asking whether the motion was preparatory to enabling the machine to do its work? One may have cases where the motion required to prepare the machine might be just as dangerous as normal working because it would be just as fast.]

See *per* Lord Oaksey [6] that there is no statutory prohibition which makes it obligatory to keep fencing in position when machinery is only being moved so far as is necessary for repair; and *per* Lord Porter [7]: "It was not working in the normal "way but being turned over to effect the necessary repairs." "Motion" is a question of degree in many cases. In *Dodd* v. *Ben Capper Ltd.*,[8] where Finnemore J. was considering this same type of machine and an inching button, he applied the same construction as was applied in *Cummings'* case,[9] and held that if the movement was within the limited area common to the machine in his case and that in the present case, the fact that the inching movement was effected by mechanical power did not suffice to distinguish it from *Cummings'* case.[9] What was considered in *Cummings'* case [9] and is decisive in this is whether any movement, however small, however slow, and however effected, could be "motion" within the section, and it was decided that it had a more limited meaning, limited to the normal working movement of the machine and not extending to intermittent movement at slow speed, however produced, merely for the purpose of turning the parts round for inspection, repair, cleaning or adjustment. The object of the inching button is merely labour-saving in order to produce minute movements of the rollers by a device wholly within the control of the operator. The provisions in the Unfenced Machinery Regulations specifically exempting the inching button, which would not be needed unless it were caught by section 16, were put in ex abundanti cautela. Strict adherence to the regulations is required in cases where they apply; but the inching provision in the regulations makes it clear that that is not the kind of movement with which they are dealing.

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[6] [1955] A.C. 321, 330.

[7] Ibid. 332.

[8] March 17, 1961, Stafford Assizes (unreported).

[9] [1955] A.C. 321.

[DONOVAN L.J. But the effect of the regulations is that " in " motion " covers " in motion " by an inching button.]

It is unnecessary; and the regulations were not relied on in *Cummings'* case.[9] Moreover, they were enacted after the Act of 1937 and so cannot be relied on to construe the section. *Cummings'* case [9] should be applied to the facts here and the decision of the county court judge affirmed.

A. E. James Q.C. in reply. If the submissions for the employers are correct, every millwright and fitter engaged in his ordinary work would be outside the protection of the Act, for their work is preparatory and not productive. That would greatly narrow the scope of the protection. It may be that the correct test of " in motion " is the view of the reasonable bystander. There may be movements for cleaning or repair which are not " motion " within section 16. But there is no authority for doing cleaning and repair without guards. " Motion " must be construed as that motion which creates danger, whether it be slow or fast. Once it is conceded that this is a dangerous part, the movement of it by the means provided is " motion " within section 16. Finnemore J. in *Dodd* v. *Ben Capper Ltd.*[10] said that a machine is " in motion " if it is moving as it was intended to be moved to do its work or if the motion was one for which the machine was designed and intended to be used. That covers this case, where the inching button is incorporated in the design, and the motion is achieved by moving parts of machinery. Here there was " motion " and " use " which should be guarded against by keeping the fence in position.

HOLROYD PEARCE L.J. stated the facts as set out above, read the relevant part of section 14 (1), and continued: That section [section 14 (1)] must be read in conjunction with section 16, which reads as follows: " All fencing or other safeguards provided " in pursuance of the foregoing provisions of this Part of this Act " shall be of substantial construction, and constantly maintained " and kept in position while the parts required to be fenced or " safeguarded are in motion or in use, except when any such " parts are necessarily exposed for examination and for any " lubrication or adjustment shown by such examination to be " immediately necessary, and all such conditions as may be

[9] [1955] A.C. 321.

[10] March 17, 1961, Stafford Assizes (unreported).

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"specified in regulations made by the Secretary of State are "complied with." The exception does not include exposure for cleaning purposes. Therefore, if, on the proper construction of the words as applied to the facts in the present case, the dangerous parts were "in motion or in use" at the time of the accident, the defendants were in breach. Does the section, though clearly not directed to such a case as this, extend widely enough to cover it?

The only section that applies to cleaning is section 20, which says that a woman or young person shall not clean any part of any machine if the cleaning thereof would expose them to the risk of injury from any moving part of that machine. That seems to contemplate that there may be circumstances in which an adult male may lawfully be exposed to risk when cleaning a moving part.

However, the Operations at Unfenced Machinery Regulations, 1938 and 1946 [S.R. & O. 1938, No. 641 and S.R. & O. 1946, No. 156], seem to indicate that the inching process here involved could only be lawfully carried out with the guard removed if it is carried out in compliance with those regulations. Regulation 1 provides: "Regulations 2 to 7 of these regulations shall apply to "the following operations, namely . . . (ii) the carrying out, in "pursuance of section 16 of the Act, of an examination or any "lubrication or adjustment shown by such examination to be "immediately necessary, when parts of machinery otherwise "required to be fenced or safeguarded are in motion or in use "but are necessarily exposed for those operations: Provided that "regulations 5 and 6 shall not apply in relation to any part of "machinery which is only being moved by hand or by a barring "engine or by an inching or similar device, so however that no "such operation shall be carried out except by a male person who "has attained the age of eighteen." That seems to indicate that the regulations other than 5 and 6 do apply to any part of machinery which is being only moved by hand or by an inching device and also that, apart from the express exclusion of regulations 5 and 6, the prohibitions therein would apply to such a process. If section 16 does not in any event apply to such an operation, there was no necessity to exclude the operation of regulations 5 and 6.

Mr. Thompson, for the defendants, argues that the exclusion was inserted ex abundanti cautela, in case there was any misapprehension as to the meaning of section 16. He may well be right. Moreover, subsequent regulations are no reliable guide to the construction of a statute. Furthermore, the argument founded on the regulations was available to the losers in *Richard Thomas & Baldwins Ltd.* v. *Cummings*,[1] and was either not taken or did not prevail.

In my judgment, it is to that case that we must look for guidance, as did the judge. In that case, the plaintiff was a fitter who found it necessary to rotate a face plate of a power-driven grinding machine on which he was making adjustments. The power had been cut off. He pulled on one of the transmission belts and, in so doing, crushed his finger between the belt and a pulley. It was held that there was no breach of statutory duty, since the machinery was not "in motion or in use" within the meaning of section 16. That case clearly established, therefore, that mere movement of the machinery did not necessarily mean that it was "in motion or in use." Lord Tucker[2] founded his opinion on the fact that the power was cut off and that, therefore, in that case the machinery could not be "in motion." He left open the meaning of the words in other circumstances. The other noble and learned Lords, however, did not adopt this line of reasoning or regard the absence of power as the deciding factor. Lord Oaksey said[3]: "The words of the exception in section 16 "are expressly confined to occasions 'when any such parts are "'necessarily exposed for examination and for any lubrication or "'adjustment shown by such examination to be immediately "'necessary.' It is not without significance that the word "'repair' which had occurred in section 10 (1) (*d*) of the Factory "and Workshop Act, 1901 (1 Edw. 7, c. 22), was omitted from section 16 of the Act of 1937, and it is clear, in my opinion, that "section 16 only excepts examination and adjustment if immediately necessary whilst the machinery is in normal motion or use "but does not except repairs which are not immediately necessary "which therefore, cannot be carried out whilst the machinery is in "normal motion without the fencing. The words 'in motion or "'in use' in section 16 do not, in my opinion, refer to such "movement of machinery by hand as took place in the present "case, and section 16 does not deal in any way with such "movement. There is, therefore, no statutory prohibition which "makes it obligatory to keep fencing in position when machinery "is being repaired and is only being moved in so far as is "necessary for the repair." It is to be noted that the word

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[1] [1955] A.C. 321; [1955] 2 W.L.R. 293; [1955] 1 All E.R. 285, H.L.

[2] [1955] A.C. 321, 336.

[3] Ibid. 330.

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"cleaning," like the word "repair," occurred in section 10 (1) (*d*) of the Factory and Workshop Act, 1901, and was similarly omitted from section 16 of the Factories Act, 1937. Therefore, the same argument applies both to repairing and cleaning. Lord Porter said[4]: "'In use' would certainly mean running as it was "meant to run and doing the work it was meant to do. But "provision is required for cases where it was running as it was "meant to run but not doing the work it was meant to do. In "such a case it would, in my view, be in motion but not in use. "The addition of the words 'in motion' is accordingly required "to cover such a set of circumstances, but one would not "normally say that the machine was in motion when someone "turned it over by hand for the purpose of effecting a repair or "some similar purpose. This view is strengthened when it is "found that no provision is contained in the Act enabling fencing "to be removed for the sake of repair. In such a case they may "be in movement but not in motion." After dealing with the Act of 1901 and its exception of machinery while it was under repair, he concluded: "That provision was excluded from the "Act of 1937 not, I think, with the result of making repair "impossible unless the machine was at rest, but because it was "felt that repair should not be permitted whilst it was running "in its normal manner, whether driving its ordinary load or not. "In the present case it was not working in its normal way but "merely being turned over in order to effect the necessary "repair." Finally, Lord Reid, with whom Lord Keith of Avonholm agreed, said[5]: "The phrase 'in motion' appears to me to "be more apt to describe a continuing state of motion lasting or "intended to last for an appreciable time"; and again he said[6]: "But there must be many occasions in the course of repairing "and readjusting machinery when it is necessary to expose parts "which in ordinary use must be fenced and to move them to an "appreciable extent. . . . I can see no answer to the argument "that, if the respondent's construction of section 16 is correct, "it is practically impossible in such cases to make the necessary "repairs and readjustments without committing an offence by "contravening the provisions of section 16."

The reasoning of those opinions applies to the present case. The construction of the words "in motion or in use" must be the same whether the object was repair or cleaning. In my judgment, that case is authority for the proposition that the words

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[4] [1955] A.C. 321, 332.

[5] Ibid. 333–334.

[6] Ibid. 334.

"in motion or in use" connote the substantial movement of its normal working or, if it is not at the time achieving its normal purpose, some movement reasonably comparable to its normal working. This view is in accord with that expressed by Finnemore J. in *Dodd* v. *Ben Capper Ltd.*[7] The slow, sporadic rotation or intermittent movement of machinery intended to place it more advantageously for cleaning or repair is not normally motion or use within the section, whether it be produced by man-power or mechanical power. In some cases it may be clear into which category the movement fits. In borderline cases it must be a question of fact and degree. Here the judge was right in deciding that the machinery was not in motion.

I cannot accept Mr. James's forceful argument that since it was being prepared for its normal work it was in one phase of its normal activity, nor that, since the inching could be used for threading paper into the machine, it was, when being inched, performing its normal activity but in a lower gear. The inching process was quite different from its normal process. The button was designed so that only while it was being pressed did the machine move; but the roller was intended to revolve continuously at high speed, not to inch forward slowly while the button was being pressed. Nor can I accept that it was the duty of the defendants to insist on the guard being lowered while the plaintiff pressed the button and caused the roller to revolve an inch or so. Such a precaution would be unreal. The plaintiff had only to keep his hand clear while he was himself pressing the button. Indeed, if I took a contrary view as to the alleged breach of section 14, I would hold that the plaintiff himself was entirely to blame for the accident. I would dismiss the appeal.

UPJOHN L.J. I agree with the judgment that my Lord has delivered, and only desire to add one or two words of my own.

By section 14 of the Factories Act, every dangerous part of any machinery, other than prime movers and transmission machinery, must be securely fenced, subject to certain exceptions. The defendants concede that the relevant part of the machinery is dangerous and falls within section 14 and therefore it must be securely fenced. Section 16 then provides a number of conditions for such fencing, of which the only one with which we are concerned is that it shall be "constantly maintained and kept in "position while the parts required to be fenced or safeguarded

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[7] March 17, 1961, Stafford Assizes (unreported).

"are in motion or in use." The whole question is whether, on the facts of this case, the dangerous machinery was "in motion "or in use"; for, if so, the fencing admittedly provided by the employer was not, at the relevant time, maintained and kept in position. The plaintiff had lifted it out of position; but that affords no defence to the alleged breach of the statutory requirements.

Mr. James has argued that the machine was in use at the time of the accident. I cannot accept that argument As a matter of common sense and ordinary use of the English language, the machinery was not then in use. It was not being used for its ordinary commercial purpose, that is, printing. It was a slack period when the machine was not being used at all. The plaintiff, as the machine operator, was taking advantage of the slack period, as he did and as it was his duty to do two or three times a week, to clean the machine while it was not in use. The sole question, therefore, in my judgment, is whether, at the moment of the accident, the machine was "in motion."

The question whether a machine is "in motion" for the purposes of the Act must be a matter which is largely one of fact and degree in every case, and it is not possible to lay down any general principles to provide a solution to the problem. The case of *Richard Thomas & Baldwins Ltd.* v. *Cummings*[8] affords valuable guidance to this court as to the proper approach to the problem. The House of Lords there decided that the mere fact that the transmission machinery was moving did not mean that it was necessarily "in motion" for the purposes of the section. All the Law Lords agreed that some limitation must be put on the words "in motion," for otherwise it would be impossible to carry out repairs except when every dangerous part was stationary, or by committing an offence under section 16. Lord Tucker decided the case on the short ground that the machinery was not being put in motion by mechanical means, but the other learned Lords did not take this short cut. Lord Reid said, referring to the phrase "in motion"[9]: "Using the phrase in its "ordinary sense I do not think that one would naturally say of "a man moving parts of a machine round to a required position "that he had set the machine or its parts in motion. The "phrase 'in motion' appears to me to be more apt to describe "a continuing state of motion lasting or intended to last for an "appreciable time."

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[8] [1955] A.C. 321.

[9] Ibid. 333–334.

Applying that to the facts of this case, what was the situation? The blanket roller was being cleaned. The plaintiff did not turn over the roller by hand but rightly used the inching button which enabled him to turn over the roller very slowly—that is, at the rate of one revolution every twelve seconds—and so expose another segment of the roller which he then cleaned with petrol and a rag. This operation he then repeated. Is it proper to describe this movement of the roller, albeit by mechanical means but dead slow for, I suppose, two or three seconds or thereabouts at a time, to uncover another segment of the roller for cleaning purposes, as being "in motion"? Having regard to the clear limitation placed on the words "in motion" in *Richard Thomas & Baldwins Ltd.* v. *Cummings*,[10] in my judgment the answer must necessarily be in the negative. I also agree with my Lord that, had I reached a contrary conclusion, I would have thought that the accident was due entirely to the plaintiff's own fault.

DONOVAN L.J. I agree. I also think it is impossible to prescribe an exhaustive definition of the terms "in motion" or "in use" as they are used in section 16. One can say that "in motion" means something more than merely in movement; that a machine may be put "in motion" manually as well as by power; and that a machine may be "in use" notwithstanding some temporary halt in the running of it. Beyond this, general guidance is difficult to give, and any attempt at it might be misconceived. In particular, I do not think it would be right to say that a machine is "in motion" when it is being run for the industrial purpose it was installed to achieve, but not "in "motion" when being run for some preparatory purpose. Some such preparatory work might involve running at high speeds, and fitters and others would be without protection if the dangerous parts of the machine were left unfenced during this operation. Parliament could not have intended that.

Accordingly, I do not think one can do more than look at the facts of each particular case and ask whether they involve that the parts of the machine required to be fenced or safeguarded were in motion or in use for the purposes of section 16, bearing in mind the object of this legislation, namely, the protection of the workman. The judge below answered that question in the negative; and, for the reasons already given by my Lords with which I agree, I think he was right.

[10] [1955] A.C. 321.

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As to the point raised by Mr. James on the wording of the Operations at Unfenced Machinery Regulations, 1938 and 1946, it is clear that whoever drafted these had in mind that there might be some cases of movement by an inching device which would put the dangerous parts of the machine "in motion" for the purposes of sections 15 and 16. But it does not follow that all such movement has this result. This serves to emphasise the unwisdom of trying to lay down some universal proposition which will govern the infinite variety of machines and industrial processes. On the facts of this case, the wording of the regulations does not, in my opinion, compel a decision in favour of the appellant.

Appeal dismissed with costs.
Leave to appeal to the House of Lords granted.

Solicitors: *Sharpe, Pritchard & Co. for Bosworth, Bailey, Cox & Co., Birmingham; E. P. Rugg & Co. for Buller, Jeffries & Kenshole, Birmingham.*

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Holroyd Pearce, Willmer and Pearson L.JJ.

MORRISON ROSE & PARTNERS v. HILLMAN.

[1958 M. No. 2930.]

Estoppel—Per rem judicatam—Writ, prior issue of—Architect—Claim for fees—Terms of oral contract—Finding by tribunal of fact in plaintiffs' favour—Judgment delivered after issue of writ in second action between same parties raising same issues—Amendment of plaintiffs' reply in second action to allege estoppel per rem judicatam—Whether plea maintainable—R.S.C., Ord. 24.

On June 30, 1958, a firm of architects issued a writ against the defendant, an estate developer, claiming under the terms of an alleged oral agreement fees on the R.I.B.A. scale for abortive work done by them for the defendant in respect of anticipated land development which had not in fact been developed. The defendant claimed that the terms of the oral agreement expressly provided that the plaintiffs should receive no fees for abortive work. On December 11, 1958, the plaintiffs issued another writ against the defendant, claiming scale fees based on the same oral agreement in respect of work done on another abortive project.

On March 22, 1960, the Official Referee, after a four-week hearing of all the available evidence as to the terms of the oral agreement, gave judgment for the plaintiffs for the fees claimed in the first action. After that judgment had been given, the plaintiffs sought and obtained leave to amend their reply to the defence in the second action to raise an estoppel on the ground that the issue as to their right to scale fees under the agreement for work abandoned was res judicata. It was conceded by the defendant that no fresh evidence was available. The Official Referee refused to hear any evidence as to the terms of the oral agreement, and decided the second action in favour of the plaintiffs solely on the basis of his judgment in the first case. On appeal by the defendant, it was contended that a rule of law laid down in *The Delta* (1876) 1 P.D. 393, 404 and the rules of pleading (R.S.C., Ord. 24, r. 1[1]) precluded the plaintiffs from amending their reply to claim an estoppel per rem judicatam where the judgment sought to be relied on had been given after the issue of the writ in the instant action:—

Held, dismissing the appeal, that as the plaintiffs now had an opportunity to plead estoppel per rem judicatam they should be allowed to amend their reply to do so, for there was no rule of law or of pleading which prevented a party to an action from relying on such estoppel, either as a plea in bar or as conclusive evidence, and the objects of the rule as to estoppel per rem judicatam, namely, public policy, that there should be an end of litigation, and that the individual should not be vexed twice in the same matter, applied equally to a judgment given after as before the issue of the writ in like proceedings.

Dicta in *Lockyer* v. *Ferryman* (1877) 2 App.Cas. 519, 530, H.L. applied.

In re Defries, Norton v. *Levy* (1883) 48 L.T. 703 and *Bell* v. *Holmes* [1956] 1 W.L.R. 1359; [1956] 3 All E.R. 449 (on this point) approved.

The Delta (1876) 1 P.D. 393 explained.

Decision of Official Referee affirmed.

APPEAL from Sir Brett Cloutman Q.C., Official Referee.

The defendant, Isaac David Hillman, was an estate developer whose business consisted of getting options on land and erecting buildings on it if he could obtain the necessary finance. He approached the plaintiffs, Morrison Rose and Partners, a firm of architects, and orally agreed with them that they should act as his architects in his various projects on certain special terms. They did a large amount of work for him on many schemes, of which some bore fruit and some did not.

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[1] R.S.C., Ord. 24, r. 1: "Any "ground of defence which has arisen "after action brought, but before the "defendant has delivered his defence, "and before the time limited for his "doing so has expired, may be raised "by the defendant in his defence, "either alone or together with other "grounds of defence. And if, after "a defence has been delivered, any "ground of defence arises to any "set-off or counterclaim alleged there-"in by the defendant, it may be "raised by the plaintiff in his reply, "either alone or together with any "other ground of reply."

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Morrison Rose & Partners v. Hillman.

Disputes arose between the parties as to Hillman's liability, if any, to the architects for abortive architectural work done in respect of anticipated land development that never in fact developed. Unless payment for such work was excluded by a special term in the oral agreement, that agreement entitled the architects to the R.I.B.A. scale fees on work abandoned. The defendant asserted that it was expressly agreed that the plaintiffs should receive no fees at all for abortive work.

On June 30, 1958, the architects issued a writ [1958 M. No. 1578], claiming against the defendant the fees which they alleged were due under the contract in respect of abortive work done in connection with a proposed development known as "Beechcroft" which was abandoned. The defendant claimed that the contract provided that the architects would not be paid for work abandoned and that, accordingly, no fees were due.

On December 11, 1958, the architects issued another writ [1958 M. No. 2930] in respect of another abortive project on which they had done considerable work and claimed £5,044 for fees due on the R.I.B.A. scale for work abandoned. That writ was the writ in the instant action.

The "Beechcroft" action was heard by the Official Referee (Sir Brett Cloutman Q.C.) in March, 1960, and after a four-week hearing, during which about eight days were devoted to exhaustive evidence as to the terms of the alleged contract between the parties, he gave judgment, on March 22, 1960, for the plaintiffs for the sum claimed, holding that on the facts as he found them they were entitled to fees on the R.I.B.A. scale for abandoned work.

The plaintiffs thereupon sought and obtained leave to amend their reply to the defence in the instant action to "maintain that "the defendant ought not to be permitted to contend that the "allegations made in his defence are true" since the issue as to their right under the agreement to charge scale fees for work abandoned was res judicata by reason of the judgment in the "Beechcroft" action.

The present action came before the same Official Referee in June, 1960, when the defendant contended that no estoppel could be raised by the judgment in the "Beechcroft" case since it was given after the issue of the writ in the present case. It was conceded for the defendant that there was no fresh evidence available, and that if the Official Referee heard evidence it would be the same as that on which he based the first decision. The Official Referee, after careful consideration, decided against the defendant on the point as to estoppel. He refused to hear any evidence as to the terms of the oral agreement, and decided the matter in favour of the plaintiffs solely on the basis of his judgment in the "Beechcroft" case, which he considered to be conclusive; and he gave judgment for the plaintiffs for £5,044. The defendant appealed.

E. S. Fay Q.C. and *A. C. Bulger* for the defendant. The defendant resists the plea of estoppel per rem judicatam which the plaintiffs have been given leave to raise in their reply because the only way in which he can have the issue as to the terms of the contract retested is by another trial before another referee, since the Official Referee's decision on fact is final. The question, not hitherto decided by the Court of Appeal, is whether plaintiffs can in their reply allege an estoppel by record arising from a judgment given after the date of the issue of the writ in the instant action. It is conceded that, if the judgment had been given before writ issued, it would inevitably raise such an estoppel. The plea is resisted on two grounds: (1) the rule of law laid down by Phillimore J. in *The Delta, The Erminia Foscolo* [2]; and (2) the rules of pleading, and in particular R.S.C., Ord. 24.

On the first point, Phillimore J. in *The Delta* [3] based his decision that there was no estoppel on the fact that none existed when the suit was begun. In *Houston* v. *Marquis of Sligo* [4] Pearson J. was "rather inclined" to agree. *In re Defries, Norton* v. *Levy* [5] is distinguishable, for though Pollock B. held that the defendant could plead an estoppel by a judgment given after the institution of the proceedings before him, the plaintiff was in person and the matter was not fully argued. In *Bell* v. *Holmes* [6] McNair J. decided this point against the present submission; but there, too, it was the defendant who sought to raise the estoppel and it may be distinguished on that ground. But that case was wrongly decided. If it were rightly decided it would have far-reaching consequences for litigants. McNair J., after citing Lush J.'s decision in *Ord* v. *Ord*,[7] said [8] that estoppel per rem judicatam is merely a matter of evidence. It is conceded that *Ord* v. *Ord* [9] sets out the philosophical justification for such estoppel, but it had no relevance in *Bell* v. *Holmes*[10] nor on the question before this court. Estoppel is not merely evidence. It is well settled that estoppel must be pleaded as an allegation, though evidence may thereafter be given in support of the plea.

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[2] (1876) 1 P.D. 393.
[3] Ibid. 404.
[4] (1885) 29 Ch.D. 448, 454; 1 T.L.R. 217.
[5] (1883) 48 L.T. 703.
[6] [1956] 1 W.L.R. 1359; [1956] 3 All E.R. 449.
[7] [1923] 2 K.B. 432.
[8] [1956] 1 W.L.R. 1359, 1366.
[9] [1923] 2 K.B. 432.

On the second point, the rules of pleading support the submission that estoppel per rem judicatam cannot be raised by a plaintiff after writ issued: see Halsbury, vol. 15 (3rd ed., p. 211), that "a lis pendens without judgment raises no estoppel and a "judgment cannot take effect as res judicata or estoppel unless "it was given before the proceedings in which it is relied on were "commenced": Bullen & Leake (11th ed., p. 801, Form 674), giving the modern precedent with the averment that the decision was "before" the commencement of the instant action. The position was similar under the old rules of pleading: see Bullen & Leake (3rd ed., p. 451). The Rules of the Supreme Court, Ord. 24, r. 1, makes an exception by allowing a defendant to raise in his defence matters arising after writ issued (or a plaintiff in his reply where there is a counterclaim). But there is no provision for a plaintiff to raise such an estoppel in his pleading, for the curtain comes down for the plaintiff when the writ is issued. Before the Supreme Court of Judicature Act, 1873, and the New Rules of the Supreme Court, estoppel per rem judicatam was not conclusive of an issue unless it was pleaded, though it could be used as evidence, or waived: see the earlier editions of Smith's Leading Cases. In the 13th edition (vol. 2, p. 664), it is stated that since the Judicature Act it must be pleaded, though it may be waived, and a party may even be estopped against raising estoppel. *Eshelby* v. *Federated European Bank Ltd.*[11] supports the view that the rules of pleading do not enable a plaintiff to raise matters arising after writ issued.

[HOLROYD PEARCE L.J. The Divorce Division has adopted the principle that a party must have his cause of action at the time of the pleadings.]

[PEARSON L.J. The distinction between the rights of plaintiff and defendant seems very artificial.]

There is justification for the distinction, for the plaintiff is dominus litis who brings the defendant to court against his will. Estoppel being a matter of allegation that must be pleaded, there is no opportunity for these plaintiffs to plead in their reply matters that did not arise before the date of the writ. The rules of pleading are governed by the date of the writ, save for the one exception in R.S.C., Ord. 24.

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[10] [1956] 1 W.L.R. 1359.

[11] [1932] 1 K.B. 254.

Leonard Caplan Q.C. and *Peter Slot* for the plaintiffs. In the notes to the locus classicus on estoppel—the *Duchess of Kingston's* case [12]—estoppel is described as "a heading of the "law once tortured into a variety of refinements but now almost "reduced to consonancy with the rules of common sense and "justice." That process of reduction should be continued and the court will consider the basic principles of estoppel per rem judicatam stated by Lord Blackburn in *Lockyer* v. *Ferryman* [13] rather than cases decided when highly technical rules of pleading were observed and insisted on. This case took four weeks of judicial time, eight days of which were devoted to an exhaustive consideration of all the available evidence, and it would, on the principles stated by Lord Blackburn, be contrary to public policy and hardship on the plaintiffs to allow it to be relitigated. On those principles the exact moment at which the judgment sought to be relied on was given does not matter. The precedents relied on for the defendant were those in use before the Common Law Procedure Amendment Act of 1852 when the defendant was limited in his original plea to the facts as they existed when the proceedings were begun and could only raise matters subsequently arising by a plea in bar to the further maintenance of the action or puis darrien continuance; but that is not the position now. *The Delta* [14] was a case of an estoppel on an estoppel where Phillimore J. refused to allow the defendant to raise estoppel because he could originally have pleaded lis alibi pendens and did not avail himself of the opportunity to do so: it did not lay down the rule for which the defendant here contends. If Pollock B.'s decision in *In re Defries, Norton* v. *Levy* [15] was correct, it is conclusive in the plaintiffs' favour here. The use of estoppel by record was stated in the *Duchess of Kingston's* case [16] to be two-fold: (1) as a plea in bar; and (2) as evidence. Now that the technicalities of pleading have been reduced, the court need be concerned only with its use as evidence. The reasoning in *Bell* v. *Holmes* [17] that estoppel by record is a matter of evidence of so high and conclusive a quality that it should not be limited to matters that take place before the action began is justified. The dangers envisaged as arising from that decision as a whole are dealt with in *Randolph* v. *Tuck.*[18]

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[12] (1776) 2 Smith's L.C. (13th ed.) 655.

[13] (1877) 2 App.Cas. 519, 530.

[14] 1 P.D. 393, 404.

[15] 48 L.T. 703.

[16] 2 Smith's L.C. (13th ed.) 655.

[17] [1956] 1 W.L.R. 1359, 1366.

The rules of pleading require a party to raise in his reply all matters which would take his opponent by surprise if he has an opportunity to plead them. For that reason these plaintiffs sought leave to amend their reply. If they are not allowed to do so, it will not matter to them, for they can still raise the judgment in the first action as conclusive evidence. In *Trevivian* v. *Lawrence*[19] Holt C.J. said that estoppel by record could be raised as evidence by the plaintiff if he had had no opportunity to plead it. That supports the statement to the like effect in 1 Roscoe's Civil Actions, 20th ed., p. 192. [*McHenry* v. *Lewis*[20] and *Cox* v. *Mitchell*[21] were also referred to.] *Eshelby* v. *Federated European Bank Ltd.*[22] does not assist, for it was a decision about not raising causes of action after writ issued, and estoppel is not a cause of action. The suggested distinction between the rights of plaintiff and defendant to raise estoppel by record offends against the first principle of estoppel, namely, that it must be mutual. [*Bancroft* v. *Bancroft and Rumney*[23] and *Symons* v. *Rees*[24] were also referred to.]

Fay Q.C. in reply. The lack of mutuality in the rules of pleading is a difficulty, but it is not a fatal defect. If the court decides against the defendant on this point, the practice as stated in Halsbury (3rd ed., vol. 15, at p. 211), will have to be altered.

Holroyd Pearce L.J. stated the facts set out above and said that the identical agreement which decided the main issue in the present case was also the deciding factor in the first case, and that it was conceded for the defendant that if the judgment in the first case had been given before the writ in the present action was issued it would have created a binding estoppel in accordance with the general principles of estoppel by res judicata. His Lordship continued: Mr. Fay, for the defendant, relies on two arguments. First, he argues that, following the judgment of Phillimore J. in *The Delta*,[1] there is a rule that no estoppel can arise from a judgment in another case given after the issue of the writ. There is no authority in this court on the point. Secondly, he argues that estoppel by res judicata must be pleaded in order to be effective, and that the rules of pleading do not enable the plaintiffs to plead an estoppel that arises after action brought.

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[18] [1961] 2 W.L.R. 855; [1961] 1 All E.R. 814, C.A.

[19] (1704) 2 Ld.Raym. 1048, 1051.

[20] (1882) 21 Ch.D. 202.

[21] (1859) 7 C.B.N.S. 55.

[22] [1932] 1 K.B. 254.

[23] (1864) 3 Sw. & Tr. 597.

[24] (1876) 1 Ex.D. 416.

[1] (1876) 1 P.D. 393.

In *The Delta*[1] the owners of the ship *Delta* sued abroad in respect of a collision between two ships and obtained judgment against the owners of the other ship. Before that judgment a writ had been issued against the owners of the *Delta* in England. The owners of the *Delta* sought to say that a foreign judgment delivered while the English suit was pending created an estoppel in their favour, but the court refused to accept the estoppel.

The judge said[2]: " . . . I am of the opinion this defence must " fail, for two reasons: the first is that at the time when the suit " against the *Delta* was begun there was confessedly no res judi- " cata; there was only a lis alibi pendens; and if the owners of the " *Delta* had wished to escape from having two suits against them " for the same matter brought to a hearing, they should have put " the owners of the *Erminia Foscolo* to their election, compelling " them to abandon one or the other of the suits, according to the " rule laid down by me in *The Mali Ivo*,[3] and quite recently applied " in *The Catterina Chiazzare*.[4] As regards the suit against the " *Erminia Foscolo*, that was brought by the owners of the *Delta* " while the foreign lis was pending; they cannot be heard, there- " fore, to object that that lis is a bar to a decision on the merits " in this suit. The second reason is that the foreign judgments " not having been given on the merits of the case, but on matters " of form only, cannot be set up as a bar to a decision on the " merits."

I understand the judge to be saying that the owners of the *Delta* had an opportunity when both actions were pending of pleading a lis alibi pendens and putting their opponents to an election. Instead of doing so, they chose to lie by until they had secured a victory and then tried to rest on that and avoid a second trial. They must be taken to waive their right to fight one action only, and they ought not to be heard to rely on estoppel. As Lord Coke said: " An estoppel against an estoppel " setteth the matter at large."

I cannot accept that case as authority for the general proposition that a judgment in another case could not act as an estoppel merely because it was given after the issue of the writ in the second case.

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[1] 1 P.D. 393.
[2] Ibid. 404.
[3] (1869) L.R. 2 A. & E. 356.
[4] (1876) 1 P.D. 368.

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MORRISON ROSE & PARTNERS *v.* HILLMAN.

Holroyd Pearce L.J.

In *Houston* v. *Marquis of Sligo*[5] the headnote reads, inter alia: "Whether a judgment obtained in one action before the "trial of another can operate by way of estoppel as res judicata, "unless the judgment was obtained before the issue of the writ in "the second action, *Quaere*." The passage in the judgment from which that part of the headnote derives is as follows[6]: "The "first point which strikes me is that which was suggested by "Mr. Higgins, viz., that, inasmuch as a plea of res judicata is a "plea in bar to the institution of an action, that plea cannot "succeed in the present case inasmuch as the judgment in the "Irish action did not exist at the time when the writ in the "English action was issued. I am rather inclined to think that "that view is right, and that I cannot stop the proceedings "in this action upon the ground that in the interval between the "issue of the writ and the hearing of the present application, "judgment has been pronounced in the Irish action. But I am "unwilling to decide this case entirely upon that ground, because, "however right the decision in *The Delta*[7] may have been under "the old practice, I am not satisfied, without a closer examination "of the existing Rules of Court, that a defendant is not now at "liberty to set up as res judicata, a decision of the point at issue "by a court of competent jurisdiction during the progress of the "action."

The judge was therefore considering the matter rather as one of technical difficulty and pleading than as a principle of law, and the case gives little help.

In *In re Defries, Norton* v. *Levy*[8] Pollock B. said: "No "doubt it has long been settled, as was laid down by De Grey "C.J. in an old case, that if the defendant has had an oppor"tunity of pleading a judgment and has not done so, he may "be considered to have waived the estoppel. But the defendants "cannot be said to have waived the estoppel by not pleading this "judgment, for it was not in existence when the pleadings closed. "I think it will be found that there is an old decision that it is "sufficient to plead pendency of another action in order to enable "the party pleading to put the judgment in such action in evi"dence by way of estoppel. But I do not base my decision upon "that. It is sufficient to rest upon the broad principle that, unless "the court is driven, by the party's not pleading the judgment,

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[5] (1885) 29 Ch.D. 448; 1 T.L.R. 217.

[6] 29 Ch.D. 448, 454.

[7] 1 P.D. 393.

[8] (1883) 48 L.T. 703, 704.

" to the conclusion that he has waived the estoppel, the estoppel " will not fail."

He went on to hold that the defendant could raise a judgment in a previous case as an estoppel, though it was given after the writ. Mr. Fay seeks to say that the judgment was ill-considered because the plaintiff was unrepresented and the court did not have a proper argument; but I cannot agree.

Finally, in *Bell* v. *Holmes* [9] McNair J. held that a judgment in an earlier case given after a later action had been started created an estoppel. The plaintiff sued the defendant in the High Court in respect of a collision between the plaintiff's and the defendant's motor-cars. While that action was pending both parties were successfully sued by a third party in the county court, and the county court judge apportioned the blame between them both. The plaintiff was held to be estopped in the High Court from contending that he was not negligent in the proportion decided by the apportionment of the county court judge.

After considering the well-known judgment of Lush J. on the nature of res judicata in *Ord* v. *Ord* [10] McNair J. said [11]: " There " are other passages in the same judgment which support the " view, which I suggested in the course of discussion, that it is a " matter of evidence. If it is a matter of evidence, it is a ques" tion of what evidence can properly be given in this court today, " and if it is a matter of evidence I can see no reason at all why " I should be limited to consider evidence consisting of a judg" ment in a case where that judgment has been given before the " issue of the writ."

Mr. Fay contends that that case was wrongly decided, but I find myself unable to agree so far as concerns the point in the present argument. There are other points in that judgment on which we have not heard argument, and express no opinion: see *Randolph* v. *Tuck*.[12]

In support of his second point Mr. Fay relies on *Eshelby* v. *Federated European Bank Ltd.*,[13] which establishes that a plaintiff cannot add a cause of action that has arisen since the issue of the writ. Estoppel is not a cause of action; but he argues that no matter that arose since the writ can be relied on by a plaintiff.

The Rules of the Supreme Court, by Order 24, expressly allow the defendant to raise a ground of defence that has arisen since the issue of the writ, but no such privilege is given to a plaintiff to plead, either in his statement of claim or reply, anything that has arisen since the writ. Mr. Fay seeks to deduce a general principle from the fact that it was necessary to grant an express privilege to the defendant by Order 24. But in my judgment such a deduction is unwarranted.

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[9] [1956] 1 W.L.R. 1359; [1956] 3 All E.R. 449.

[10] [1923] 2 K.B. 432; 39 T.L.R. 437, D.C.

[11] [1956] 1 W.L.R. 1359, 1366.

[12] [1961] 2 W.L.R. 855; [1961] 1 All E.R. 814.

[13] [1932] 1 K.B. 254.

The object of estoppel per rem judicatam is succinctly expressed by Lord Blackburn in *Lockyer* v. *Ferryman*,[14] where he said: "The object of the rule of res judicata is always put "upon two grounds—the one public policy, that it is the "interest of the State that there should be an end of litigation, "and the other, the hardship on the individual, that he should "be vexed twice for the same cause."

The argument which Mr. Fay puts forward can claim no ground of principle on which to exclude judgments given after writ issued from the general principle which Lord Blackburn there put forward. Finis litium is no less desirable when the suits are almost contemporaneous.

In 2 Smith's Leading Cases (13th ed. at p. 657), estoppels are referred to as "a head of law once tortured into a variety of "absurd refinements, but now almost reduced to consonancy with "the rules of common sense and justice." I should be loth to resurrect any earlier refinement that has no present justification.

The industry and learning of counsel have taken us concisely through the old intricacies of pleading. Mr. Caplan argues that the early cases were much concerned with the question of waiver of estoppel by technicalities of pleading; and he rightly contends that the answer to this problem should not now be found in any technicality of pleading. The argument that the defendant can evade an estoppel (even though a plaintiff cannot do so) from a judgment given after the issue of the writ, merely because the plaintiff has no means of pleading it under the Rules of the Supreme Court, does not accord with justice or common sense, and in my judgment it is not maintainable.

Roscoe's Evidence in Civil Actions (20th ed., vol. 1, at p. 192), referring to the *Duchess of Kingston's* case,[15] says: "The "language of the judges on the first proposition enunciated above "has been thus explained, viz., that the judgment is conclusive "(i.e., an estoppel) if pleaded, where there is an opportunity "of pleading it; but that where there is no such opportunity, "then it is conclusive as evidence; but if the party forbear to rely

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[14] (1877) 2 App.Cas. 519, 530, H.L.

[15] 2 Smith's L.C. (13th ed.) 644.

"upon an estoppel when he may plead it, he is taken to waive "the estoppel, and to leave the prior judgments as evidence only "for the jury."

That passage is good sense, and it is confirmed by cases which are there cited. In *Treviban* v. *Lawrence* [16] Holt C.J. makes observations that support the view that estoppel only has to be pleaded if there is an opportunity of pleading it. I accept that view.

In the present case there was no opportunity of pleading the estoppel in the original pleadings since it had not arisen when they were delivered. The validity of the estoppel is therefore unaffected by its absence from the original pleading. Nevertheless, the plaintiff must plead it, if he can, by amendment. If the amendment is refused, he can still rely on it; but to refuse such an amendment would be purposeless. Therefore, in my judgment the plaintiffs are entitled to plead this estoppel in their reply by amendment. I can find no ground for creating an artificial exception from the general rule of estoppel per rem judicatam, by distinguishing res judicatae that follow the issue of a writ from those which precede it. The principles which make the latter desirable have no less application to the former, and should be applied to both alike. I would dismiss the appeal.

WILLMER L.J. I agree; and my Lord has dealt with the matter so fully that I can usefully add nothing.

PEARSON L.J. I agree; and the only point I should like to add is that in the opinion of the judges in the *Duchess of Kingston's* case [17] there is this passage: "From the variety of "cases relative to judgments being given in evidence in civil suits, "these two deductions seem to follow as generally true: first, "that the judgment of a court of concurrent jurisdiction, directly "upon the point, is as a plea, a bar, or as evidence, conclusive, "between the same parties, upon the same matter, directly in "question in another court; . . ."

To my mind, the easiest line of approach to this question is to regard the previous decision as conclusive evidence. The theory then becomes easier. If the parties have submitted to the decision of a court an issue between them, and that issue has been fully considered and decided on the evidence which they have called, it

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[16] (1704) 2 Ld.Raym. 1048, 1051.

[17] 2 Smith's L.C. (13th ed.) 644, 645.

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Morrison Rose & Partners v. Hillman.

is reasonable that the decision given should be conclusive evidence as between those parties for the purpose of another suit between them. It would be unreasonable that the same controversy should be re-agitated over and over again. I fully agree with the decision that has been given, and that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Joelson & Co.; Hewitt, Woollacott & Chown.*

M. M. H.

1960
May 12, 13, 16, 17, 18.

Pearson J.

SOCIETÉ FRANCO TUNISIENNE D'ARMEMENT *v.* SIDERMAR S.P.A.

Contract — Frustration — Charterparty — Voyage charter — Usual and customary route via Suez blocked—Whether term of charterparty that vessel to go via Suez—Construction of charterparty—Basis of doctrine of frustration—Whether blockage of Suez must have been unforeseen at time of charterparty.

Estoppel—Conduct, by—Charterparty—Usual and customary route via Suez blocked—Shipowners, knowing Suez blocked, give notice of readiness to load and permit cargo to be loaded—No representation of fact—Equitable estoppel inapplicable.

Quantum Meruit — Shipping — Freight — Charterparty — Frustrated by blockage of Suez—Claim by shipowners for reasonable remuneration for voyage round Cape.

By a charterparty dated October 18, 1956, shipowners chartered their vessel to charterers for the carriage of iron ore from Masulipatan, on the east coast of India, to Genoa. The terms of the charterparty were, inter alia, that the vessel should proceed with all convenient speed to Masulipatan and there load. The captain was to wireless the shippers at Madras giving four days' preliminary notice and also 48 hours' definite notice of his expected time of arrival at the loading port. The captain was also to telegraph to "Maritsider Genoa" on passing the Suez Canal. On July 26, 1956, President Nasser had announced the nationalisation by Egypt of the canal. Thereupon, the canal became the subject of an international crisis and when the charterparty was concluded there was a possibility that the crisis could result in a resort to force, in which event the canal might become closed to shipping. At the time of the charterparty the route via the Suez Canal was the shortest and customary route from Masulipatan to Genoa. If the

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[Reported by A. D. Rawley, Esq., Barrister-at-Law.]

canal was closed the shortest route was via the Cape of Good Hope. When they entered into the charterparty both shipowners and charterers appreciated these facts. From October 28, 1956, until the general cease fire, there was heavy fighting in the Sinai Peninsular between Egyptian and Israeli forces. On October 31, 1956, the air forces of Britain and France attacked various targets in Egypt. On November 5 and 6 British and French troops landed in the areas of Port Fuad and Port Said. By November 4 at least eight ships had been sunk in the Suez Canal, blocking it to shipping. By November 9, when the vessel arrived at Masulipatan, both parties appreciated that it was likely that the canal would remain blocked for a period of time which would, if the vessel were to await the re-opening of the canal, be so long as to put an end to the commercial purpose of the venture. Nevertheless notice of readiness to load was given immediately the vessel arrived at Masulipatan. The charterers tendered a cargo of iron ore which was loaded with the captain's permission between November 13 and 18. A bill of lading dated November 18 was issued by the shipowners in respect of this cargo. The vessel sailed for Genoa on November 19. On November 20, the shipowners informed the charterers that the blocking of the canal had brought the charterparty to an end and they claimed freight at the rate of 209s. per long ton of the cargo. The charterers maintained that the shipowners remained bound by the charterparty, and that they could not claim freight at a rate higher than that provided by the charterparty, namely, 134s. per long ton. It was agreed by the parties that the dispute should be referred to arbitration in London, and that pending the result of the arbitration the charterers should pay freight at the charterparty rate. The vessel sailed round the Cape of Good Hope and arrived at Genoa on February 16, 1957, having off-loaded 238·563 long tons of ore at Ceuta into the ss. *Condesa* in order to comply with the International Load-Line Convention. The two vessels delivered a total of 4,904·635 long tons of ore at Genoa on which the charterers paid freight at the rate of 134s. per long ton.

The distance between Masulipatan and Genoa via the Cape was about twice the distance via the canal. The extra distance round the Cape rendered the voyage financially more onerous to the shipowners and exposed the vessel to maritime hazards for a longer period but the vessel was capable of withstanding such hazards. The cargo was not exposed to any risk of damage or deterioration, and there was no evidence that another voyage had been fixed for the vessel on arrival at Genoa or that any trading schedule had been dislocated by the voyage round the Cape. If the vessel had been able to sail via the Suez Canal she would not have arrived before December 16, 1956, and therefore she would not have been able to load any more cargo at Masulipatan if she was to arrive in Genoa in December laden no deeper than her winter marks. A reasonable remuneration for the carriage from Masulipatan to Genoa via the Cape of the cargo loaded in the vessel was 195s. per long ton:—

Held, (1) that the charterparty was frustrated by the blocking of the Suez Canal because, having regard to the express provisions of the contract and the surrounding circumstances, it was a term of the contract (whether express or implied) that the vessel was to go by the Suez Canal route and the route via the Cape was so circuitous, unnatural and different in a number of respects that it was to be regarded as a fundamentally different voyage. The position was not analogous to the case of a c.i.f. contract for the sale of goods (post, pp. 306, 307).

Principles in *Davis Contractors Ltd.* v. *Fareham Urban District Council* [1956] A.C. 696; [1956] 3 W.L.R. 37; [1956] 2 All E.R. 145 applied.

Carapanayoti & Co. Ltd. v. *E. T. Green Ltd.* [1959] 1 Q.B. 131; [1958] 3 W.L.R. 390; [1958] 3 All E.R. 115; *Tsakiroglou & Co. Ltd.* v. *Noblee Thorl G.m.b.H.* [1960] 2 Q.B. 318; [1960] 2 W.L.R. 869; [1960] 2 All E.R. 160, C.A.; [1959] 2 W.L.R. 179; [1959] 1 All E.R. 45; and *Albert D. Gaon & Co.* v. *Société Interprofessionelle des Oléagineux Fluides Alimentaires* [1960] 2 Q.B. 318; [1960] 2 W.L.R. 869; [1960] 2 All E.R. 160, C.A.; [1959] 3 W.L.R. 622; [1959] 2 All E.R. 693 distinguished.

(2) That the possibility, appreciated by both parties, at the time of making their contract, that a certain event might occur, did not necessarily prevent the frustration of the contract by that event when it did occur; it was one of the surrounding circumstances to be taken into account in construing the contract, and had greater or less weight according to the degree of probability or improbability and all the facts of the case (post, pp. 299, 303).

(3) That, notwithstanding that notice of readiness to load had been given, and that the shipowners had permitted the cargo to be loaded when they knew that the canal had been blocked, there had been no representation of fact which at common law estopped the shipowners from alleging frustration, and there had been no development of the doctrine of equitable estoppel which was wide enough to cover the facts of the present case (post, p. 310).

(4) That the shipowners were entitled to be paid a reasonable freight at the rate of 195s. per long ton on a quantum meruit (post, p. 314).

Craven-Ellis v. *Canons Ltd.* [1936] 2 K.B. 403; 52 T.L.R. 657; [1936] 2 All E.R. 1066 applied.

SPECIAL CASE stated pursuant to section 21 (1) (*b*) of the Arbitration Act, 1950, by an arbitrator (Ashton Roskill Q.C.).

The following facts and extracts from the special case and the charterparty are taken from the judgment of Pearson J.

By a charterparty dated October 18, 1956, made between Compagnie de Navigation Européenne on behalf of Société Franco Tunisienne D'Armement (hereafter called "the shipowners") and Sidermar S.p.a. of Genoa (hereafter called "the charterers"), the shipowners' vessel *Massalia* was chartered to the charterers for the carriage from Masulipatan to Genoa of a cargo of iron ore. The following were the material clauses of the charterparty: "2. That the ship . . . shall . . . proceed with all convenient speed "to Masulipatan and there load always afloat in the customary "manner subject to 24 hours turn as per clause 28 when, where "and as soon as ordered by shipper's agent a full and complete "cargo of iron ore, say about 5,000 tons, not exceeding what "she can reasonably stow and carry . . . and being so loaded, "shall with all convenient speed proceed to Genoa (including "Molo Nino Ronco) and there deliver the same . . . 3. Freight "to be paid at and after the rate of 134s. (one hundred and thirty "four shillings) f.i.o. and free stowed and or trimmed per ton of "20 cwt. or 1016 kilos delivered . . . 6. Time for loading to "count from 6 a.m. after the ship is reported and ready, and in "free pratique (whether in berth or not), and for discharging "from 6 a.m. after ship is reported and in every respect ready, "and in free pratique, whether in berth or not. Steamer to be "reported during official hours only . . . 19. Ship to apply to "shippers Messrs. Murlidhar Jhunjhunwala, Madras, telegraphic "'Jhunjhun Madras' for cargo, and wire them on leaving last "port of discharge if there are telegraphic facilities, failing which "shippers to be allowed one extra day for loading . . . 28. At "loading port time counting 24 hours after notice of readiness "has been tendered and accepted whether in berth or not . . . "29. 75% of freight to be paid within 7 days from telegraphic "advice of signing of bills of lading and balance on outturn "quantity on right and true delivery of cargo . . . 34. . . . "Chamber of Shipping War Risk Clauses 1 and 2 . . . are to be "deemed incorporated in this charterparty . . . 37. Captain to "wireless to shippers Messrs. Murlidhar Jhunjhunwala, Madras, "telegraphic 'Jhunjhun Madras' giving 4 days preliminary notice "and also 48 hours definite notice of his expected time of arrival at "loading port. Captain also to telegraph to 'Maritsider Genoa' on "passing Suez Canal." The Chamber of Shipping War Risk Clause No. (2) which was incorporated in the charterparty, provided: "The ship shall have liberty to comply with any orders or direc-"tions as to departure, arrival, routes, ports of call, stoppages, "destination, delivery or otherwise howsoever given by the "government of the nation under whose flag the vessel sails or any "department thereof, or by any other government or any depart-"ment thereof, or any person acting or purporting to act with "the authority of such government or of any department "thereof . . ." In fact no such order or direction was given; at any rate, there was no mention of any such order or direction in the special case.

The arbitrator found the following facts: On July 26, 1956, President Nasser announced the nationalisation by Egypt of the Suez Canal. Thereupon the Suez Canal became the subject of an international crisis. This crisis developed with increasing gravity and by October 18, 1956, when the charterparty was concluded, the possibility existed that it could culminate in resort to force in which event the Suez Canal might become closed to shipping. At the time of the conclusion of the charterparty (October 18, 1956) the route via the Suez Canal was the shortest and the customary route from Masulipatan to Genoa. In the event of the Suez Canal being closed to shipping the shortest practicable route from Masulipatan to Genoa would be via the Cape of Good Hope. At the time when the charterparty was concluded both the shipowners and the charterers appreciated these facts. From October 28, 1956, until the general cease fire, heavy fighting took place in the Sinai Peninsula between Egyptian and Israeli forces. From October 31, 1956, until the general cease fire, pursuant to ultimata delivered on October 30, 1956, to the Egyptian and Israeli Governments by the British and French Governments, the air forces of Great Britain and France launched attacks on various targets in Egypt. On November 5 and 6, 1956, airborne and seaborne landings of British and French troops took place in the Port Said and Port Fuad areas. The general cease fire took effect on November 7, 1956. By November 2, 1956, a total of at least five ships had been sunk in the Suez Canal, thereby blocking it. On November 4, 1956, at least three more ships were sunk at Suez, blocking the canal, and by that date the canal was closed to all traffic. By November 7, 1956, over forty sunken ships were blocking the canal and it was likely that it would remain blocked for a period of time which would, if the vessel were to await the re-opening of the canal, be so long as to put an end to the commercial purpose of the venture into which the shipowners and the charterers had entered. By November 9, 1956, the shipowners and the respondents appreciated all those facts.

On November 9, 1956, the vessel arrived at Masulipatan and on the same day gave notice of readiness to load. (No written notice of readiness was put in evidence.) The charterers by their agents tendered a quantity of 4,951 long tons of iron ore for loading on the vessel and by their agents loaded that cargo between

November 13 and 18, 1956 (both dates inclusive). The master of the vessel permitted the 4,951 long tons to be loaded on the vessel and a bill of lading in respect thereof dated November 18, 1956, was issued by the shipowners. Thus loaded, the vessel sailed from Masulipatan for Genoa on November 19, 1956. On November 20, 1956, the representative of the shipowners informed the representatives of the charterers at Genoa that the shipowners' view was that the charterparty had been brought to an end by the blocking of the Suez Canal and because of the likelihood of its remaining blocked for a substantial period of time, and intimated that the shipowners claimed payment of a total freight at the rate of about 209s. per long ton. The representatives of the charterers replied that in their view the shipowners remained obliged to perform the charterparty and were not entitled to payment by the charterers of freight at a rate higher than the rate fixed by the charterparty, namely, 134s. per long ton. At no time prior to November 20, 1956, was it contended by or on behalf of the shipowners that the charterparty had been brought to an end. No explanation was offered in evidence for the shipowners' delay between November 9 and 20, 1956, in raising this contention. Subsequent to November 20, 1956, further discussions took place between the representatives of the shipowners and the charterers and on December 5, 1956, it was agreed that the dispute between them should be submitted to arbitration in London and that, pending the result of such arbitration, the charterers should pay to the shipowners freight at the rate fixed by the charterparty, namely, 134s. per long ton. The vessel sailed from Masulipatan for Genoa and, after calling at Colombo where she remained from November 23 to November 29, 1956 (both dates inclusive), proceeded via the Cape of Good Hope. This was then the shortest practicable route from Masulipatan to Genoa. On February 8, 1957, the vessel while on her voyage to Genoa arrived at Ceuta in the Mediterranean for bunkering. In accordance with the International Load-Line Convention the winter load-line season in the Mediterranean becomes operative on December 16 and ends on March 15. The vessel's winter load-line was submerged when she arrived at Ceuta and in consequence a quantity of 238·563 long tons of the vessel's cargo was there offloaded and transhipped to Genoa in the ss. *Condesa*. The *Massalia* and the *Condesa* arrived at Genoa on or about February 16, 1957, and there delivered a total cargo of 4,904·635 long tons. The charterers paid to the shipowners freight at the rate of 134s. per long ton on the 4,904·635 long tons in three instalments, namely, on November 26, 1956, on December 8, 1956, and on April 23, 1957. The instalment paid on November 26, 1956, represented approximately 75 per cent. of freight at the rate of 134s. per long ton.

The arbitrator found the following further facts: The distance between Masulipatan and Genoa via the Cape of Good Hope was approximately twice the distance via the Suez Canal. The additional distance via the Cape of Good Hope would render and in fact rendered the voyage financially more onerous to the shipowners than a voyage via the Suez Canal would have been but there was no evidence of the actual extra cost to the shipowners thereby involved. The additional distance via the Cape of Good Hope would expose and in fact exposed the vessel to maritime hazards for a longer period of time than would have been the case of a voyage via the Suez Canal, but there was no evidence that the maritime hazards likely to be encountered or in fact encountered via the Cape of Good Hope by the vessel, loaded as she was, were such as she would not be able to withstand and the vessel was at all material times capable of withstanding the maritime hazards of a voyage from Masulipatan to Genoa via the Cape of Good Hope. The additional distance via the Cape of Good Hope would not and did not expose the cargo of iron ore to any appreciable risk of damage or deterioration. There was no evidence that the vessel had been fixed for another voyage to follow the voyage from Masulipatan to Genoa or that she had any trading schedule which was or might be dislocated in consequence of her proceeding via the Cape of Good Hope instead of via the Suez Canal. If the voyage had been capable of being performed via the Suez Canal the vessel would not have arrived at Genoa before December 16, 1956. In such event the quantity of cargo (4,951 long tons) which the master permitted to be loaded at Masulipatan would have exceeded the quantity which the vessel was capable of carrying if she was to arrive at Genoa laden no deeper than her winter marks. If the voyage had been capable of being performed via the Suez Canal, little, if any, cargo could have been loaded on the vessel in excess of the quantity which, having regard to the requirements of the International Load-Line Convention, she was capable of carrying via the Cape of Good Hope. "Maritsider Genoa" was the telegraphic address of the charterers. The charterers were not at any time parties to the bill of lading or to any contract evidenced thereby and did not at any time know of the reservation in the bill of lading with regard to possible "readjustment of freight in case vessel compelled "deviate from normal route owing obstruction Suez Canal." The arbitrator stated that he regarded the terms of the bill of lading as irrelevant. A reasonable remuneration for the carriage from Masulipatan to Genoa via the Cape of Good Hope of the cargo loaded in the vessel was 195s. per long ton delivered. Accordingly, the total remuneration over and above that fixed by the charterparty for the carriage of the cargo from Masulipatan to Genoa amounted to £14,959 2s. 9d.

The shipowners contended that the contract was frustrated on November 9, 1956, or at the latest, on November 13, 1956, by the closure of the Suez Canal, and that an agreement was to be inferred from the events that had happened and the conduct of the parties that the charterers would pay a reasonable remuneration for the carriage of the cargo from Masulipatan to Genoa. The charterers contended that the charterparty was not frustrated. They also contended, in the alternative, that if it was, then the shipowners by their conduct were estopped and precluded from so contending. The charterers also contended that an agreement was to be inferred from the conduct of the parties that the cargo would be carried from Masulipatan to Genoa via the Cape of Good Hope at the same rate of freight as that provided in the charterparty or on the charterparty terms. The shipowners denied that by words or conduct they represented, as alleged by the charterers, that the charterparty was not frustrated, or that they were ready and willing to perform the charterparty notwithstanding the blocking of the canal, or that they were not going to insist on their strict legal rights by desisting from further performance.

The arbitrator held as follows: (1) The continued availability of the Suez Canal was not, on a true construction of the charterparty, a basic assumption of the charterparty. (2) The performance of the voyage from Masulipatan to Genoa via the Cape of Good Hope was not commercially or fundamentally different from its performance via the Suez Canal. (3) The charterparty was not frustrated. (4) If (contrary to this view) the charterparty was frustrated, then: (a) the shipowners were not estopped and precluded from so alleging; (b) no agreement between the shipowners and the charterers was to be inferred that the cargo would be carried from Masulipatan to Genoa via the Cape of Good Hope at the same rate of freight as that provided by the charterparty or on the charterparty terms. (5) If the charterparty was frustrated and the shipowners were not estopped and precluded from so alleging, an agreement was to be inferred between the shipowners and the charterers that the charterers would pay a reasonable remuneration for the carriage of the cargo from Masulipatan to Genoa.

The questions of law stated for the decision of the court were: (i) Whether upon the facts found the shipowners were estopped and precluded from contending that the charterparty was frustrated? (ii) If the answer to the first question was "No," whether upon a true construction of the charterparty and upon the facts found, the charterparty was frustrated. (iii) If the answer to (i) was "No," and the answer to (ii) was "Yes," whether upon the facts found the shipowners were entitled to remuneration beyond the amount to which they were originally entitled under the terms of the charterparty. The arbitrator answered the above questions as follows: (i) No, (ii) No, and (iii) Did not arise.

A. A. Mocatta Q.C. and *R. A. MacCrindle* for the shipowners. The events which occurred clearly frustrated this charterparty and it does not necessarily follow that frustration is precluded because the frustrating event was within the contemplation of the parties when they made their contract. [Reference was made to *W. J. Tatem Ltd.* v. *Gamboa.*[1]] Here the parties must have made the contract on the footing that the route through the Suez Canal was available although they did not expressly say so. As it turned out, there was a fundamental alteration in the circumstances which destroyed the basis on which the contract was made; a term is to be implied to the effect that the route was to be via Suez and accordingly the contract is to be treated as frustrated. As to the theory of the implied term, see *Sir Lindsay Parkinson & Co. Ltd.* v. *Commissioners of Works*[2] and *British Movietonews Ltd.* v. *London and District Cinemas Ltd.*[3] Whether or not such a term is to be implied is a matter of the construction of the contract: see *Davis Contractors Ltd.* v. *Fareham Urban District Council.*[4] The construction of the contract requires a consideration of all the circumstances and is a matter of law.

Here the voyage via the Cape was different in kind from that contemplated by the charterparty. The Suez Canal route was fundamental to the contract and that has gone. The charterers can gain no assistance from the cases decided recently on c.i.f. contracts: see *Carapanayoti & Co. Ltd.* v. *E. T. Green Ltd.*,[5] *Tsakiroglou & Co. Ltd.* v. *Noblee Thorl G.m.b.H.*[6] and *Albert D. Gaon & Co.* v. *Société Interprofessionelle des Oléagineux Fluides Alimentaires.*[7] In a c.i.f. contract the main element is the sale of goods. Among the duties of the seller is the obligation to procure a contract of affreightment in respect of the goods. This, however, is merely one of the seller's duties, and the seller is not himself obliged to carry the goods on their voyage. Carriage of goods simpliciter is an entirely different sort of contract. The route is vitally important and a deviation is a fundamental breach. In the c.i.f. contracts affreightment was only one aspect of the contract entered into between seller and buyer. [Reference was made to the judgment of Sellers L.J. in the *Tsakiroglou* and *Gaon* cases.[8]] In any event there was no mention of Suez in any of the c.i.f. contracts, whereas in this case the Suez Canal is mentioned in the contract and shows that the bargain between the parties was on the footing that the route was to be via Suez. [*Glidden Co.* v. *Hellenic Lines Ltd.*[9] was also referred to.]

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[1] [1939] 1 K.B. 132; [1938] 3 All E.R. 135.

[2] [1949] 2 K.B. 632; [1950] 1 All E.R. 208, C.A.

[3] [1952] A.C. 166; [1951] 2 T.L.R. 571; [1951] 2 All E.R. 617, H.L.

[4] [1956] A.C. 696; [1956] 3 W.L.R. 37; [1956] 2 All E.R. 145, H.L.

On the question of estoppel, the finding and the decision of the arbitrator are in favour of the shipowners. Estoppel is basically a question of fact, and the finding of the arbitrator is conclusive. Frustration occurs automatically. What the parties say and do is only evidence, and not necessarily weighty evidence, of the view to be taken of the event by informed and experienced minds: see *Hirji Mulji* v. *Cheong Yue S.S. Co. Ltd.*[10] [Reference was also made to *Reg.* v. *Dent.*[11]] It cannot be said that the shipowners did anything which prevented them from exercising their legal rights under the charterparty if the contract is frustrated. There was no representation of fact and the doctrine of equitable estoppel affords no assistance to the charterers. The findings of the arbitrator in paragraph 12 of the special case prevent the charterers from taking any argument on estoppel.

If the shipowners' contention on frustration is correct, then they were under no obligation to carry the goods. Having carried them, the court will imply a term for reasonable payment: *Hain Steamship Co. Ltd.* v. *Tate & Lyle Ltd.*[12]

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[5] [1959] 1 Q.B. 131; [1958] 3 W.L.R. 390; [1958] 3 All E.R. 115.

[6] [1960] 2 Q.B. 318; [1960] 2 W.L.R. 869; [1960] 2 All E.R. 160, C.A.

[7] [1960] 2 Q.B. 318; [1960] 2 W.L.R. 869; [1960] 2 All E.R. 160, C.A.

[8] [1960] 2 Q.B. 318, 357–364.

[9] 275 F. 2d 253.

[10] [1926] A.C. 497; 42 T.L.R. 359, P.C.

[11] [1955] 2 Q.B. 590; [1955] 3 W.L.R. 297; [1955] 2 All E.R. 806, C.C.A.

[Pearson J. What is the basis of this claim? Is it an implied term or a solution imposed ex aequo et bono? The charterers would not, perhaps, have agreed to pay the higher price.]

Since a contract can be frustrated without the parties knowing it, the law must give a solution. Here the shipowners' claim is based on a quantum meruit. The law implies an obligation to pay a reasonable remuneration. The obligation arises as a matter of law and is not an inference of fact. [Reference was made to *Sir Lindsay Parkinson & Co. Ltd.* v. *Commissioners of Works*,[13] *British Movietonews Ltd.* v. *London and District Cinemas Ltd.*,[14] *Davis Contractors Ltd.* v. *Fareham Urban District Council*[15] and *Craven-Ellis* v. *Canons Ltd.*[16]]

Roy Wilson Q.C. and *Basil Eckersley* for the charterers. The contract was made when both parties appreciated the possibility of a closure of the Suez Canal. When the event occurred neither mentioned it to the other. The burden of showing that a contract is frustrated lies upon the party alleging it and the burden is a heavy one. It is not enough to show that the contract has become financially more onerous. All the events must be considered to see whether the contract covered them or not. [Reference was made to the *Tsakiroglou* case.[17]] The material time for the performance of a charterparty is the time of loading. If no usual or reasonable route is available at the material time, is the alternative a radical alteration of the contract? In this case it was not; here there was no express provision that the ship should go via Suez. The shipowners contend that it must necessarily be implied, but the court will not lightly read terms into a contract. Clause 37 of the charterparty provides merely subsidiary machinery; notice on passing Suez could have been waived by the shipowners, and in any event such notice was not vital to the contract. There is a difference between expectation and contractual obligation. [Reference was made to *Davis Contractors Ltd.* v. *Fareham Urban District Council*.[18]] The parties here may have anticipated that the ship would go via Suez; that is not to say that they made it a matter of contractual obligation.

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[12] (1936) 52 T.L.R. 617; [1936] 2 All E.R. 597, H.L.

[13] [1949] 2 K.B. 632.

[14] [1952] A.C. 166.

[15] [1956] A.C. 696.

[16] [1936] 2 K.B. 403; 52 T.L.R. 657; [1936] 2 All E.R. 1066.

[17] [1960] 2 Q.B. 318.

[18] [1956] A.C. 696.

It is wrong to ask what the assumption was. The true test is "what was the contract?"

[PEARSON J. A surrounding circumstance, to be taken into account in construing the contract, and an expectation may be different. The charterers must succeed if they can show that there was no contractual obligation to go via Suez.]

Both parties knew of the likelihood of a closure of the canal. Frustration cannot apply, because the parties failed to make express provision for that situation in the contract. The dicta of Goddard J. in *W. J. Tatem Ltd.* v. *Gamboa*[19] are wrong. They are inconsistent with *British Movietonews Ltd.* v. *London and District Cinemas Ltd.*[20] and the other cases. See Chitty on Contracts, 21st ed., vol. 1, pp. 201, 202. [Reference was also made to *Bank Line Ltd.* v. *A. Capel & Co.*[21] and *Chandler Bros. Ltd.* v. *Boswell.*[22]]

[PEARSON J. If on August 31, 1939, I contract to send a ship to Hamburg, surely there is a frustration when war is declared?]

Not if both parties are aware of the risks of the situation. Here there was no express provision to go via Suez. The shipowners ask that such a term should be implied, but where both parties can foresee all possibilities such a term will not be implied. Indeed, if the canal had not been blocked but the war risks clauses had been invoked and the ship ordered to go via the Cape, there would have been no frustration.

[PEARSON J. Does the fact that both parties appreciated that the canal might close make frustration impossible? Is it not rather something which should be regarded as part of the surrounding circumstances to be considered when construing the contract?]

There can be no implied term where the parties foresee a state of affairs but make no provision for it. [Reference was made to *Chandler Bros. Ltd.* v. *Boswell*,[23] *F. A. Tamplin Steamship Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.*,[24] *Bank Line Ltd.* v. *A. Capel & Co.*[25] and *Jennings & Chapman Ltd.* v. *Woodman, Matthews & Co.*[26]] Viscount Simon in *British Movietonews Ltd.* v. *London and District Cinemas Ltd.*[27] spoke of a fundamentally different situation unexpectedly emerging.

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[19] [1939] 1 K.B. 132.

[20] [1952] A.C. 166.

[21] [1919] A.C. 435; 35 T.L.R. 150, H.L.

[22] [1936] 3 All E.R. 179, C.A.

[23] Ibid.

[24] [1916] 2 A.C. 397; 32 T.L.R. 677, H.L.

[25] [1919] A.C. 435.

[26] [1952] 2 T.L.R. 409, C.A.

[27] [1952] A.C. 166, 185.

See also Lord Radcliffe's speech in *Davis Contractors Ltd.* v. *Fareham Urban District Council.*[28]

There is nothing in the nature of this contract to indicate that the route had to be via Suez. There was nothing in the nature of the cargo which could necessitate such an implication. The voyage by the Cape gave rise to no additional marine perils. There was no evidence that there would be or was any trading dislocation caused by the longer voyage. There is no difference in principle between a charterparty and a c.i.f. contract. Both deal with the furnishing and carrying of goods. *Glidden Co.* v. *Hellenic Lines Ltd.*[29] shows that the same principles apply to charterparties as apply to c.i.f. contracts because *Gaon's* case [30] was cited in the judgment.

[Pearson J. I do not think you can place any strong reliance on the cases involving c.i.f. contracts.]

If the contractual intention is not clear it is permissible in certain circumstances to look at the subsequent conduct of the parties to see what they intended. If the contract was to go by Suez, then immediately on its closure the shipowners should have said "we cannot be bound." It is true that the opinions of the parties are irrelevant when considering whether frustration has taken place: see Lord Radcliffe's speech in *Davis Contractors Ltd.* v. *Fareham Urban District Council.*[31] On the other hand, it is permissible to look at the subsequent conduct of the parties in order to construe the contract. Here the shipowners had a fortnight in which to act, but they did not suggest that frustration had occurred until the day after the vessel had sailed. [Reference was made to *Larrinaga & Co. Ltd.* v. *Société Franco-Americaine des Phosphates de Medulla, Paris.*[32]]

In any event the shipowners are estopped from asserting that the contractual obligation was to go via Suez, because after the closure of the canal they gave notice of readiness to load, which could only have been given in relation to the charterparty. The representation of fact was that they were ready and willing to load. The charterers acted to their detriment by relying on that statement of fact. Representations as to the future and which include propositions of law can found estoppel. Statements of intention can be statements of fact. [Reference was made to *Harnam Singh* v. *Jamal Pirbhai,*[33] *Lyle-Mellor* v. *A. Lewis & Co.*

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[28] [1956] A.C. 696, 724–733.

[29] 275 F. 2d 253.

[30] [1960] 2 Q.B. 318.

[31] [1956] A.C. 696, 724–733.

[32] (1923) 39 T.L.R. 316; 14 Ll.L. Rep. 457, H.L.

[33] [1951] A.C. 688.

(*Westminster*) *Ltd.*[34] and *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.*[35]]

If the charterparty was frustrated, there is to be implied from the conduct of the parties an actual agreement to carry the cargo via the Cape on the same terms and at the same rate of freight as provided by the charterparty. The shipowners contend for a totally different agreement in which there is provision for reasonable remuneration but no provision for the other terms of the charterparty. This is contrary to common sense, for, to give but a few examples, the provisions as to lay days, demurrage and war risks would disappear. The shipowners treated the charterparty terms as remaining in force. The offer was their notice of readiness to load; the acceptance was the charterers' loading of the ship. In effect, the parties agreed to treat the charterparty as in force whether it was or not. The bill of lading issued by the shipowners on November 18, 1956, is relevant when considering the conduct of the parties.

As to the implication of an obligation without any consensual basis, such an obligation is never imposed when materials exist from which it is possible to infer a consensual basis. A fortiori an imputed obligation is never imposed when it is contrary to a consensual obligation which can be inferred. [Reference was made to *Sir Lindsay Parkinson & Co. Ltd.* v. *Commissioners of Works*,[36] *Craven-Ellis* v. *Canons Ltd.*[37] and *Hain Steamship Co. Ltd.* v. *Tate & Lyle Ltd.*[38]] There is no reported case of a quasi-contractual price being more than the contract price. If the juridical basis of the obligation is unjust enrichment, then all that is required is that the party who performs the services should not be out of pocket. Anyway, there is no claim for additional remuneration on the basis of extra cost incurred in going via the Cape and there was no evidence as to the amount of such extra cost.

Mocatta Q.C. in reply. On the true construction of the charterparty the parties agreed that the voyage was to be via Suez. The war risks clauses are nihil ad rem. The shipowner will not be in breach of contract if he obeys directions given to him; that is not to say that the contract is not frustrated. The fact that the blocking of the canal was a possibility in the minds

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[34] [1956] 1 W.L.R. 29; [1956] 1 All E.R. 247, C.A.

[35] [1954] 1 W.L.R. 862; [1954] 2 All E.R. 28, C.A.; [1955] 1 W.L.R. 761; [1955] 2 All E.R. 657, H.L.

[36] [1949] 2 K.B. 632.

[37] [1936] 2 K.B. 403.

[38] (1936) 52 T.L.R. 617.

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of the parties does not prevent the doctrine of frustration applying. [Reference was made to *Blane Steamships Ltd.* v. *Minister of Transport*,[39] *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.*[40] and *Bank Line Ltd.* v. *A. Capel & Co. Ltd.*[41]; Carver's Carriage of Goods by Sea, 10th ed., p. 317; and The Legal Effects of War by Lord McNair, pp. 153, 156.] Lord Radcliffe's speech in the *Davis* case[42] makes it clear that such a possibility is merely one of the factors existing in all the surrounding circumstances which must be taken into account but that it is not a conclusive factor. It is idle to make a distinction between expectation and obligation, and it is an over-simplification to say that frustration only occurs when the obligation undertaken is incapable of performance. In *Krell* v. *Henry*[43] there was no obligation qua the coronation. It was the background and it went. Further illustrations are afforded by the cases on the c.i.f. contracts where the Court of Appeal considered whether the voyage via Suez was the basis of the contracts and came to the conclusion that it was not.

As to the conduct of the parties after the event, they had very little time in which to think. The master gave notice of readiness to load but he had no authority to make a new contract: see Scrutton on Charterparties, 16th ed., p. 49, and Carver's Carriage of Goods by Sea, 10th ed., p. 30. The parties are foreigners and had to get advice on a difficult question of English law. Both common law estoppel and equitable estoppel are out of the question in view of the findings of fact in clause 12 of the special case. The master had no authority to make representations. The facts in *Harnam Singh* v. *Jamal Pirbhai*[44] are very different from those under consideration. [Reference was also made to Halsbury's Laws of England, 3rd ed., vol. 15, p. 175.]

The difficulties caused by frustration are inescapable. The shipowner is a bailee and in default of agreement he must do what is reasonable. No new agreement to treat the charterparty as valid in all respects other than the route to be taken can be inferred. The master had no authority to make such an agreement. There is a finding of fact by the arbitrator about what was under the circumstances a reasonable remuneration; the charterers are now asking the court to imply a contract in which there is a term for unreasonable remuneration. The court will not imply a term which is unnecessary or unreasonable. The parties made no contract in the consensual sense at all. It may be that if the rights of the shipowners are to be based on a quantum meruit, then all the other terms in the charterparty have gone, but it is not necessary to decide that point. In any event, if the court can impute a reasonable remuneration, it can also impute all the other terms of the charterparty. Reliance is placed on *Craven-Ellis* v. *Canons Ltd.*[45] and *Hain Steamship Co. Ltd.* v. *Tate & Lyle Ltd.*[46] There is no authority for the proposition that a greater price than that originally agreed cannot be imposed on a quantum meruit. A reasonable remuneration may be more and may be less.

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[39] [1951] 2 K.B. 965; [1951] 2 T.L.R. 763, C.A.

[40] [1943] A.C. 32; 58 T.L.R. 308; [1942] 2 All E.R. 122, H.L.

[41] [1919] A.C. 435.

[42] [1956] A.C. 696, 724–733.

[43] [1903] 2 K.B. 740; 19 T.L.R. 711, C.A.

[44] [1951] A.C. 688, P.C.

Wilson Q.C. answered. An implied term to go via Suez is inconsistent with the war risks clauses. There is no implied term to go by Suez and by no other route, for if the ship had been deviated under the war risks clauses she could have gone via the Cape. If a ship is properly deviated, there can be no frustration however wide the deviation: see *Luigi Monta of Genoa* v. *Cechofracht Co. Ltd.*[47]

On estoppel, the findings in clause 12 of the special case were partly of fact and partly of law. Only the finding that the shipowners did not represent that they were ready and willing to perform the charterparty notwithstanding the blocking of the Suez Canal is a finding of fact. All the rest are inferences of law from the indisputable facts. The representation of intention by the shipowners was not actual but is imputed and arises from the effect their conduct had on the charterers. The shipowners represented that they were not going to insist on their legal rights to say (1) that the charterparty was frustrated, and (2) that they would invoke the arbitration clause. [Reference was made to *Birmingham & District Land Co.* v. *London & North Western Ry. Co.*[48] and *Hughes* v. *Metropolitan Ry. Co.*[49]]

The fact that the master had no authority to make a new contract is merely one of the factors to be considered on the question whether there was such a new contract. It is an unimportant factor because there is no suggestion that there was no communication between the master and the shipowners.

[PEARSON J. Lack of authority was not pleaded.]

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[45] [1936] 2 K.B. 403.

[46] 52 T.L.R. 617.

[47] [1956] 2 Q.B. 552; [1956] 3 W.L.R. 480; [1956] 2 All E.R. 769.

[48] (1880) 40 Ch.D. 268, C.A.

[49] (1877) 2 App.Cas. 439, H.L.

The master had no authority to displace all the other terms of the charterparty. It would be wrong to say that in all cases where the position is governed by a quantum meruit all terms in the charterparty save as to remuneration stay the same.

Mocatta Q.C. on *Luigi Monta of Genoa* v. *Cechofracht Co. Ltd.*[50] The doctrine of frustration was not argued in that case. It proceeded on an assumption made by counsel. Each case must be looked at on its own facts. Frustration can occur in such circumstances.

PEARSON J., having read the charterparty and referred to the special case as set out above, continued: In order to decide the main question in this case, which is the question whether the contract was frustrated or not, it is necessary to consider how the doctrine of frustration of contracts has been affected by the speeches in the House of Lords in *Davis Contractors Ltd.* v. *Fareham Urban District Council*[1]; and how, in the light of those speeches, the question should be formulated in relation to the facts of the present case. All the speeches have to be taken into account. It is clearly still not incorrect to base frustration upon an implied term of the contract; that appears from passages in the speeches of Viscount Simonds,[2] Lord Morton[3] and Lord Radcliffe.[4] Also, I think that the court's decision to include in the contract, or exclude from it, an alleged implied term is part of the court's construction of the contract, and that is the proper reconciliation of what otherwise might have appeared to be slightly divergent views. The crucial importance of the construction of the contract was emphasised in the speech of Lord Reid, with which Lord Somervell agreed, and it was shown that an inquiry into what the parties would have agreed on the question at issue, if they had been asked about it at the time of the contract, is an artificial approach and in some cases unhelpful. (See the speeches of Lord Reid,[5] Lord Radcliffe[6] and Lord Somervell.[7])

Being in search of the most appropriate formulation to apply in the present case, I will read certain passages. Lord Reid said[8]: "In order to determine how far the arbitrator's findings

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[50] [1956] 2 Q.B. 552.

[1] [1956] A.C. 696; [1956] 3 W.L.R. 37; [1956] 2 All E.R. 145, H.L.

[2] [1956] A.C. 696, 715.

[3] Ibid. 717.

[4] Ibid. 727.

[5] Ibid. 719–721.

[6] Ibid. 726–729.

[7] Ibid. 733.

[8] Ibid. 719.

" are findings of law and therefore subject to review, I think it is " necessary to consider what is the true basis of the law of " frustration. Generally, this has not been necessary: for " example, Lord Porter said in *Denny, Mott & Dickson Ltd.* v. " *James B. Fraser & Co. Ltd.*[9]: 'Whether this result follows " 'from a true construction of the contract or whether it is " 'necessary to imply a term or whether again it is more " 'accurate to say that the result follows because the basis of the " 'contract is overthrown, it is not necessary to decide.' " These are the three grounds of frustration which have been " suggested from time to time, and I think that it may make a " difference in two respects which is chosen. Construction of a " contract and the implication of a term are questions of law, " whereas the question whether the basis of a contract is over- " thrown, if not dependent on the construction of the contract, " might seem to be largely a matter for the judgment of a skilled " man comparing what was contemplated with what has hap- " pened. And if the question is truly one of construction I find " it difficult to see why we should not apply the ordinary rules " regarding the admissibility of extrinsic evidence whereas, if it " is only a matter of comparing the contemplated with the actual " position, evidence might be admissible on a wider basis. " Further, I am not satisfied that the result is necessarily the " same whether frustration is regarded as depending on the " addition to the contract of an implied term or as depending on " the construction of the contract as it stands." Lord Reid later said[10]: "I think that there is much force in Lord Wright's " criticism in *Denny, Mott & Dickson Ltd.* v. *James B. Fraser* " *& Co. Ltd.*[11]: 'The parties did not anticipate fully and com- " 'pletely, if at all, or provide for what actually happened. It " 'is not possible, to my mind, to say that, if they had thought " 'of it, they would have said: " Well, if that happens, all is " ' " over between us." On the contrary, they would almost " 'certainly on the one side or the other have sought to introduce " 'reservations or qualifications or compensations.' It appears " to me that frustration depends, at least in most cases, not on " adding any implied term, but on the true construction of the " terms which are in the contract read in light of the nature of " the contract and of the relevant surrounding circumstances when " the contract was made. There is much authority for this view.

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[9] [1944] A.C. 265, 281; 60 T.L.R. 419; [1944] 1 All E.R. 678.

[10] [1956] A.C. 696, 720.

[11] [1944] A.C. 265, 275.

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Société Franco Tunisienne D'Armement *v.* Sidermar S.P.A.

Pearson J.

"In *British Movietonews Ltd.* v. *London and District Cinemas Ltd.*[12] Viscount Simon said: 'If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point—not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation.'"

Pausing there, I wish to point out the importance of that passage, because Viscount Simon had consistently in a number of cases taken the view that the doctrine of frustration could be ascribed to an implied term, and Viscount Simon is there emphasising the importance of construction of the contract. I suggest that there is not much, if any, divergence between the two views. I am sorry, there is

Then Lord Reid continued[13]: "In *Sir Lindsay Parkinson & Co. Ltd.* v. *Commissioners of Works*,[14] Asquith L.J. said: 'In each case a delay or interruption was fundamental enough to transmute the job the contractor had undertaken into a job of a different kind, which the contract did not contemplate and to which it could not apply, although there was nothing in the express language of either contract to limit its operation in this way.'" Lord Reid then referred to *Thorn* v. *London Corporation*,[15] and said[16]: "On this view there is no need to consider what the parties thought or how they or reasonable men in their shoes would have dealt with the new situation if they had foreseen it. The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end. In my view, the proper approach to this case is to take from the arbitrator's award all facts which throw light on the nature of the contract, or which can properly be held to be extrinsic evidence relevant to assist in its construction and then, as a matter of law, to construe the contract and to determine whether the ultimate situation, as disclosed by the award, is or is not within the scope of the contract so construed."

Lord Radcliffe, referring to the large number of different phrases which had been used in describing the operation of frustration, said[17]: " A full current anthology would need to be " longer yet. But the variety of description is not of any " importance so long as it is recognised that each is only a " description and that all are intended to express the same " general idea."

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[12] [1952] A.C. 166, 185; [1951] 2 T.L.R. 571; [1951] 2 All E.R. 617, H.L.

[13] [1956] A.C. 696, 721.

[14] [1949] 2 K.B. 632, 667; [1950] 1 All E.R. 208, C.A.

[15] (1876) 1 App.Cas. 120, H.L.

[16] [1956] A.C. 696, 721.

Pausing there, I would say that is an important passage, because it means that the old familiar phrases, such as " the " footing of the contract," and the " basis," or " basic assumption " of the contract, and so on, are still admissible and useful phrases which can be properly used in relation to questions of alleged frustration.

Lord Radcliffe went on to say[18]: " I do not think " that there has been a better expression of that general idea " than the one offered by Lord Loreburn in *F. A. Tamplin* " *Steamship Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co.* " *Ltd.*[19] "—and then that extract is set out. Lord Radcliffe referred to the difficulties of the implied term theory, quoting from the *Hirji Mulji* case[20] (to which I will refer later). He said[21]: " The legal effect of frustration ' does not depend on their intention " ' or their opinions, or even knowledge, as to the event.' On the " contrary, it seems that when the event occurs ' the meaning of " ' the contract must be taken to be, not what the parties did " ' intend (for they had neither thought nor intention regarding " ' it), but that which the parties, as fair and reasonable men, " ' would presumably have agreed upon if, having such " ' possibility in view, they had made express provision as to their " ' several rights and liabilities in the event of its occurrence ' " (*Dahl* v. *Nelson Donkin & Co.*,[22] *per* Lord Watson). By this " time it might seem that the parties themselves have become " so far disembodied spirits that their actual persons should be " allowed to rest in peace. In their place there rises the figure of " the fair and reasonable man. And the spokesman of the fair " and reasonable man, who represents after all no more than the " anthropomorphic conception of justice, is and must be the " court itself. So perhaps it would be simpler to say at the outset that frustration occurs whenever the law recognises that " without default of either party a contractual obligation has " become incapable of being performed because the circumstances

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[17] [1956] A.C. 696, 727.

[18] Ibid. 727.

[19] [1916] 2 A.C. 397, 403; 32 T.L.R. 677, H.L.

[20] [1926] A.C. 497, 509; 42 T.L.R. 359, P.C.

[21] [1956] A.C. 696, 728.

[22] (1881) 6 App.Cas. 38, 59, H.L.

"in which performance is called for would render it a thing "radically different from that which was undertaken by the "contract. Non haec in foedera veni. It was not this that I "promised to do. There is, however, no uncertainty as to the "materials upon which the court must proceed. 'The data for "'decision are, on the one hand, the terms and construction of "'the contract, read in the light of the then existing circum-"'stances, and on the other hand, the events which have "'occurred' (*Denny, Mott & Dickson Ltd.* v. *James B. Fraser* "*& Co. Ltd.*,[23] *per* Lord Wright). In the nature of things there "is often no room for any elaborate inquiry. The court must "act upon a general impression of what its rule requires. It is "for that reason that special importance is necessarily attached "to the occurrence of any unexpected event that, as it were, "changes the face of things. But, even so, it is not hardship "or inconvenience or material loss itself which calls the principle "of frustration into play. There must be as well such a change "in the significance of the obligation that the thing undertaken "would, if performed, be a different thing from that contracted "for."

The point emerging which is most material for the present case is that the essential comparison is not between the situation existing at the date of the contract and the situation existing at the time of the performance, but between that which the shipowners by their charterparty contracted to do and that which, in the event, had to be done in order to carry the goods to Genoa. In construing the contract, both its express provisions and the relevant circumstances known to both parties at the time of contracting have to be taken into account, and all its terms, express and implied, have to be ascertained.

Now paragraph 5 of the award contains in particular two sentences which need special consideration. The third sentence of sub-paragraph (1) says: "This crisis developed with progressively increasing gravity and by October 18, 1956, when the "charterparty was concluded, the possibility existed that it could "culminate in resort to force in which event the Suez Canal "might become closed to shipping." Then sub-paragraph (3) says: "At the time when the charterparty was concluded "(October 18, 1956) the shipowners and charterers respectively "appreciated the facts stated in sub-paragraphs (1) and (2) of

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[23] [1944] A.C. 265, 274–275.

"this paragraph."[24] Learned counsel have agreed that, notwithstanding the word "respectively," that must mean that the shipowners and charterers both appreciated the possibility.

This question therefore arises. Does the existence of a possibility, appreciated by both parties at the time of making the contract, that a certain event may occur necessarily prevent the frustration of the contract by that event when it does occur? In other words, does the frustrating event have to be unforeseen in the sense that the possibility of it has not been appreciated by the parties? In my view, on principle, the answer should be "No," because we are concerned with the construction of the contract, and it must often happen that contracting parties appreciate a possibility but do not provide for it in their contract. They cannot provide for every possible event, and the particular event concerned may appear to them to be unlikely, or they may be unable to work out the consequences of it, or may be unable to agree on the provisions to be made with regard to it, or they may simply take the chance that it may occur and frustrate their contract. For example, persons making contracts in the summer of the year 1939 must have appreciated the possibility of an outbreak of war with Germany, but such contracts could nevertheless be frustrated by the outbreak of war when it occurred.

There is also ample authority in favour of the view that the parties' appreciation at the time of making their contract that a certain event may happen does not prevent the frustration of the contract by that event when it does occur. See *Bank Line Ltd.* v. *A. Capel & Co.*[25] The contract was frustrated by continuing requisition. The parties clearly had in mind the possibility of a requisition occurring, because they had inserted an express provision relating to it.

Next there is *W. J. Tatem Ltd.* v. *Gamboa.*[26] The headnote is accurate and reads[27]: "If the foundation of a contract goes, "either by the destruction of the subject-matter or by reason of "such long interruption or delay that the performance is really "in effect that of a different contract, and the parties have not "provided what in that event is to happen, the performance of

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[24] Paragraph 5 (2) stated that at the time of the conclusion of the charterparty the route via the Suez Canal was the shortest and customary route from Masulipatan to Genoa, and that, in the event of the Suez Canal being closed to shipping, the shortest practicable route would be via the Cape of Good Hope.

[25] [1919] A.C. 435; 35 T.L.R. 150, H.L.

[26] [1939] 1 K.B. 132; [1938] 3 All E.R. 135.

[27] [1939] 1 K.B. 132.

"the contract is to be regarded as frustrated, even though the "event which causes the destruction of the subject-matter or "the interruption or delay was within the contemplation of the "parties when they made the contract." This case was concerned with a charterparty for the use of a ship in what may be called "Spanish waters." It was during the Spanish Civil War and, in fact, the ship was seized. It was held that that must have been foreseen as a possibility. The case was tried by Goddard J., who said[28]: "Sir Robert Aske meets this point by "saying there cannot be frustration where the circumstances "must have been contemplated by the parties. By 'circum-"'stances' I mean circumstances which are afterwards relied "on as frustrating the contract. It is true that in many of the "cases there is found the expression 'unforeseen circumstances,' "and it is argued that 'unforeseen circumstances' must mean "circumstances which could not have been foreseen. But it "seems to me, with respect, that, if the true doctrine be that laid "down by Lord Haldane, frustration depends on the absolute "disappearance of the contract; or, if the true basis be, as Lord "Finlay put it, 'the continued existence of a certain state of "'facts,' it makes very little difference whether the circum-"stances are foreseen or not. If the foundation of the contract "goes, it goes whether or not the parties have made a provision "for it. The parties may make provision about what is to happen "in the event of this destruction taking place, but if the true "foundation of the doctrine is that once the subject-matter of "the contract is destroyed, or the existence of a certain state of "facts has come to an end, the contract is at an end, that result "follows whether or not the event causing it was contemplated "by the parties. It seems to me, therefore, that when one uses "the expression 'unforeseen circumstances' in relation to the "frustration of the performance of a contract one is really "dealing with circumstances which are unprovided for, circum-"stances for which (and in the case of a written contract one "only has to look at the document) the contract makes no "provision." I would only like to say with regard to that passage, that possibly it is a little narrow to say that in the case of a written contract one only has to look at the document; it may be always that, if there are surrounding circumstances, they should be looked at also. Goddard J., after quoting an extract from Lord Haldane's speech in the *Tamplin Steamship* case [29] then said [30]: "I regard the learned Lord as saying there "that, unless the contrary intention is made plain, the law "imposes this doctrine of frustration in the events which have "been described. If the foundation of the contract goes, either "by the destruction of the subject-matter or by reason of such "long interruption or delay that the performance is really in "effect that of a different contract, and the parties have not "provided what in that event is to happen, the performance of "the contract is to be regarded as frustrated." That passage is of interest as an anticipation of what was afterwards said in the House of Lords in *Davis Contractors Ltd.* v. *Fareham Urban District Council.*[31]

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[28] [1939] 1 K.B. 132, 137.

Then there is *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.*,[32] in which *W. J. Tatem Ltd.* v. *Gamboa* [33] was cited [34] with approval by Viscount Simon.

In *Jennings & Chapman Ltd.* v. *Woodman, Matthews & Co.*[35] Somervell L.J. said [36]: "With regard to the sentence in "the judge's judgment in the middle of the paragraph I have "just read, Mr. McIntyre said that the word 'unexpectedly,' in "the phrase 'cannot . . . be regarded as having unexpectedly "'emerged,' was taken from a sentence in Viscount Simon's "speech in *British Movietonews Ltd.* v. *London and District* "*Cinemas Ltd.*[37] in the House of Lords, and that may be so. "The judge may have taken that adverb out of its context and "given it a wider meaning than, I am sure, Lord Simon intended "to give it in its context, because, of course, the principle of "frustration may apply although the event which frustrated it is "an event which both parties may have realised might happen." Denning L.J. said [38]: "It was suggested that this was a case of "frustration. I do not regard it as a case of frustration, but it is, "I think, analogous to it. It is a case where, to use Lord Simon's "words in the *British Movietonews* case,[39] 'a fundamentally "'different situation has now unexpectedly emerged.' The "judge agreed that a fundamentally different situation had "emerged, but said that it had not 'unexpectedly' emerged. He "thought that the parties could and should have contemplated "that it might have emerged. Even so, I think it was

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[29] [1916] 2 A.C. 397, 406.

[30] [1939] 1 K.B. 132, 139.

[31] [1956] A.C. 696.

[32] [1943] A.C. 32; 58 T.L.R. 308; [1942] 2 All E.R. 122, H.L.

[33] [1939] 1 K.B. 132.

[34] [1943] A.C. 32, 40.

[35] [1952] 2 T.L.R. 409, C.A.

[36] Ibid. 412.

[37] [1952] A.C. 166.

[38] [1952] 2 T.L.R. 409, 414.

[39] [1952] A.C. 166, 185.

"unexpected. The plain fact is that the parties did not contemplate it. They did not expect it. They proceeded on a "fundamental assumption which has turned out to be wrong." That passage is of interest as possibly drawing a distinction between that which is expected, that is to say, regarded by the parties as something which probably will happen and a mere possibility, regarded by the parties as something which perhaps might happen.

Then there is *Blane Steamships Ltd.* v. *Minister of Transport.*[40] It is sufficient for present purposes to say that that was a case of frustration by constructive total loss, and the possibility of constructive total loss must have been in the minds of the parties because they inserted in the contract an express provision relating to it.

Certain authorities were cited on the other side. There was *Chandler Bros. Ltd.* v. *Boswell.*[41] That, if I may summarise it shortly, was a case in which the defendant was the main contractor, and he contracted to divert a road for a county council, and, as incidental to that purpose, to make a tunnel. The work of excavating for the tunnel was sub-contracted to a firm called Chandler Bros. The head contract contained a provision that the engineers of the county council, if they were dissatisfied with the sub-contractor, might require the head contractors to remove him. When the sub-contract was drawn up by the parties it was drawn up with close regard to the provisions of the head contract. It was obvious that those who drew up the sub-contract had the head contract before them at the time. The sub-contract did not contain any provision to the effect that the engineers might require the removal of the sub-contractor. It was suggested that some such provision should be implied, but the court held that it could not be implied because the parties must have had fully in mind that possibility, and indeed they had drawn up the sub-contract with express relation to the head contract. It is in the light of those facts that one has to read what is said by Greene L.J.[42] and, in my view, what he said there was directed to the particular facts of that particular case, and does not throw any light on the present question.

Secondly, there was the passage from the *British Movietonews* case[43] which has already appeared in an extract which I have read.

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[40] [1951] 2 K.B. 965; [1951] 2 T.L.R. 763, C.A.

[41] [1936] 3 All E.R. 179, C.A.

[42] Ibid. 187.

[43] [1952] A.C. 166, 185.

Then Lord Radcliffe said in *Davis Contractors Ltd.* v. *Fareham Urban District Council*[44] (which I have already cited): "Two things seem to me to prevent the application of the principle of frustration to this case. One is that the cause of the delay was not any new state of things which the parties could not reasonably be thought to have foreseen. On the contrary, the possibility of enough labour and materials not being available was before their eyes and could have been made the subject of special contractual stipulation. It was not made so." There is that passage, and then there are a number of passages in a number of the speeches in which the frustrating event is described as something "unexpected" or "not contemplated" or "not anticipated," and so on.

In my view, the explanation of those descriptions being applied to the frustrating events is partly that it happened to be an accurate description in the particular case, and partly also this: the possibility, appreciated by both parties at the time of making their contract, that a certain event may occur, is one of the surrounding circumstances to be taken into account in construing the contract, and will, of course, have greater or less weight according to the degree of probability or improbability and all the facts of the case.

Now I come to the construction of the charterparty. First, it has to be noticed that clause 2 of the charterparty contains on the face of it an unqualified obligation that the vessel, having loaded at Masulipatan, is to proceed with all convenient speed to Genoa. There is no definition of the route. The parties could have said "shall proceed by way of the Suez Canal," but they did not do so. The wording of clause 2 is manifestly a point in favour of the charterers in this case.

There is, however, clause 37, the last sentence of which reads: "Captain also to telegraph to 'Maritsider Genoa' on passing Suez Canal." I fully accept Mr. Wilson's argument that, for ordinary purposes, that is an unimportant provision. He compared it, I think rightly, with the provisions of clause 19, which show that there was a similar provision for the early stage of the performance of the contract under which the vessel, on leaving last port of discharge but before reaching Masulipatan, was to wire the shippers, and, if that obligation was not performed, the penalty was that the shippers were to be allowed one extra day for loading. In my view, similarly, if the captain failed

[44] [1956] A.C. 696, 731.

to telegraph to "Maritsider Genoa" on passing the Suez Canal that would not be a fundamental breach of the contract, and would probably be an unimportant breach. The only resulting penalty on the shipowner for failure to comply with that obligation would be a liability to compensate the charterers for such damage, if any, as the breach might cause them. It is clear enough that it is for ordinary purposes an unimportant provision. But, for the present purposes, it may be extremely important, because it says that the captain is "to telegraph . . . on passing "the Suez Canal." It does not say "if the vessel passes the "Suez Canal." It assumes, at any rate, that the vessel will pass the Suez Canal. That is an assumption in the contract, and, in my view, it goes further. There is an obligation to pass the Suez Canal. If the captain has to telegraph to "Maritsider "Genoa" "on passing the Suez Canal," he must go to the Suez Canal in order to be able to do so. Therefore, in my view, there is actually an obligation to pass the Suez Canal.

That is the main point; there are also certain subordinate matters bearing on construction. There is the appreciated possibility, as I may now call it (because I have fully dealt with it already), and that is a point in favour of the charterers' contentions. But it is not so strong as an expectation. Then, secondly—in my view, not unimportant—there is the simple geography of the matter. The route by way of the Suez Canal is a fairly direct route. It goes almost due west after passing round the southern tip of India, and then through the Red Sea and the Suez Canal, and through the Eastern and Central Mediterranean, and, I suppose, through the Straits of Messina, then in a more or less northerly direction to Genoa. But the route via the Cape is a highly circuitous route, and, although that is obvious on a first glance at the map, it is, to my mind, worth emphasising. The vessel, having rounded the southern tip of India, has to pass the equator and go far down to the south to go round the Cape of Good Hope, then into the South Atlantic and northwards past the equator again into the North Atlantic. Then it has to take what may be called a sharp right turn through the Straits of Gibraltar into the Western Mediterranean and approach its destination from the west, having started from a point far to the east. It is a highly circuitous route. It is a route which no sensible person would take for the purpose unless either the Suez Canal were closed or the Suez Canal dues were utterly and uncommercially exorbitant. Otherwise it is an unnatural route.

There are also the matters with which the arbitrator dealt in the special case. There was the extra expense of going via the Cape. There was the extra journey in distance; the extra time; and the different climatic conditions, which would not affect a cargo of iron ore, but might have some effect on the vessel's crew. There is the point about chartering arrangements, though I am not quite sure whether that has any material bearing on the matter. Perhaps it does have a bearing to this extent, that the shipowners would naturally fix a charter to begin as soon as possible after the conclusion of this journey. That they would be able to do if the journey was to go through the Suez Canal but not otherwise. If the journey was to go through the Suez Canal, or, alternatively, via the Cape of Good Hope, they would not be able to do so. On the other hand, it is pointed out, quite rightly, that what would make any such charter impossible of performance was simply the happening of the frustrating event. But, on the whole, I am not clear that this point about fixing the subsequent charter has really very much bearing. Similarly, on the facts of this case, the point about the International Load Line Convention does not have much bearing, because, by whichever route the vessel went, she would be overloaded in relation to the winter load line by the time she reached Genoa.

There is a further point which I think is worth mentioning, but which again should not be unduly stressed, and that is the figure of the freight. The freight fixed was 134s. per long ton. A reasonable freight for the trip via the Cape of Good Hope was 195s. per long ton. There is no express finding in the special case that 134s. was an appropriate rate for the trip via the Suez Canal. Also, there is no finding that the rate of 134s. per long ton included any additional element to compensate the shipowners for the possibility of having to go round the Cape of Good Hope. I am rather inclined to infer that the rate of 134s. per long ton was the appropriate rate for the Suez Canal voyage, but I cannot say that it is clear from the facts as stated.

Finally, there is the point about the conduct of the parties after the frustrating event occurred. On that, Mr. Wilson, quite rightly, placed some reliance as an aid to the construction of the contract if there should be ambiguity. I think that really the principle appears in *Hirji Mulji* v. *Cheong Yue S.S. Co. Ltd.*,[45] in the passage which begins by stating[46]: " Evidently, therefore, " whatever the consequences of the frustration may be upon the

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[45] [1926] A.C. 497.

[46] Ibid. 509.

"conduct of the parties, its legal effect does not depend on their "intention or their opinions, or even knowledge, as to the event, "which has brought this about, but on its occurrence in such circumstances as show it to be inconsistent with further prosecution "of the adventure." But the last sentence of the paragraph from which I have quoted is this: "What the parties say and do is only "evidence, and not necessarily weighty evidence, of the view to be "taken of the event by informed and experienced minds." What happened in the event here was that the parties for some days went on acting as if the charterparty was still in force. Then, on November 20, the shipowners informed the charterers that they considered that the contract had been frustrated, and the reply of the charterers was that they did not agree with that view. In my view, the conduct of the parties is not a consideration of any great weight, but, of course, it should be taken into account.

It is by no means an easy question whether this contract was frustrated or not. In my view, having regard to the express provisions of the contract and the surrounding circumstances, the proper view is that it was a term of the contract (whether express or implied) that the vessel was to go by the Suez Canal route. That was the voyage which the shipowners undertook to perform. It is true to say that the voyage is not the whole of the performance which the shipowners had to give. They had to bring the vessel by what is called the preliminary voyage to Masulipatan, and there they would have to assist in the loading of the cargo on board. Again, at the vessel's destination at Genoa they would have to assist and play their due part in unloading. But, of course, the main part, or the principal part—one might say the essential part—of their performance was the voyage itself, which they were required to make via the Suez Canal. That is my view as to the meaning of the contract, and one does not have to say whether it is an express or implied term. In fact I think it is an implied term, but a term implied directly from an express term, although also one brings in all the surrounding circumstances.

Having decided that that is the true construction of the contract, and that, upon the true construction of the contract, that is the voyage which the shipowners have undertaken to make —one can say, in the language of a building contract, that that is the job which the shipowners have contracted to perform—one then has to compare that with the voyage which had to be made, or the job which had to be done, after the closing of the canal. For reasons which have already been given, I think that it was a fundamentally different voyage. It may help to make a simple comparison with what might happen in the case of a land journey. Supposing a lorry owner had contracted to carry goods from London to York. The natural way, I suppose, of going from London to York would be via the Great North Road, the A1. If that were temporarily closed, it might be necessary to make a journey a little further to the west, through Leicester and Nottingham, or a little further to the east, through Cambridge and Lincoln. It might well be said that that is the same journey with a minor variation of route; there would be no frustration. But supposing some disruptive or catastrophic event had happened which caused the whole of the roads of eastern and central England to be closed, and the motor lorry's journey had to be undertaken via Oxford, Gloucester, Chester, Liverpool, Manchester and Leeds. That would be a highly circuitous route, and it may well be that it would be a fundamentally different journey. The owner of the lorry might well say: "Non haec in foedera "veni." That is a simple comparison, and, in my opinion, it is of some assistance. At any rate, my view is this, that, manifestly, the route via the Cape of Good Hope is so circuitous, and so unnatural, and so different in a number of respects, from the route via the Suez Canal that it should be regarded as fundamentally different for the present purposes. There was, therefore, in my view, frustration of the contract, that is to say, the charterparty.

Reference was made to certain cases decided with regard to c.i.f. contracts. There was *Carapanayoti & Co. Ltd.* v. *E. T. Green Ltd.*[47] and *Tsakiroglou & Co. Ltd.* v. *Noblee Thorl G.m.b.H.*[48] Further, there was *Albert D. Gaon & Co.* v. *Société Interprofessionelle des Oléagineux Fluides Alimentaires.*[49] I think I need only read what was said by Sellers L.J. in the two latter cases. He said[50]: "The effect of the blockage of the "Suez Canal on shipowners was obvious, for the relatively short "route through the Canal was denied them, and for destinations "such as we are considering in these cases a different and much "more prolonged journey had to be substituted. But the "question is, what effect that had on the contract of sale between

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[47] [1959] 1 Q.B. 131; [1958] 3 W.L.R. 390; [1958] 3 All E.R. 115.

[48] [1960] 2 Q.B. 318; [1960] 2 W.L.R. 869; [1960] 2 All E.R. 160; [1959] 2 W.L.R. 179; [1959] 1 All E.R. 45.

[49] [1960] 2 Q.B. 318; [1960] 2 W.L.R. 869; [1960] 2 All E.R. 160; [1959] 3 W.L.R. 622; [1959] 2 All E.R. 693.

[50] [1960] 2 Q.B. 318, 358.

"the parties here." Then he goes on to examine the facts of the particular case and consider what difference it made to the contract for the sale of goods. One may say shortly that it is obvious that the position is very different in a contract for the sale of goods. Although it was a c.i.f. contract, the seller would sell the goods provided for and the buyer would buy the goods provided for. The seller would put the goods on board the ship at the port of loading as contemplated by the contract, and the buyer would receive the goods at the port of discharge as contemplated by the contract. The only differences would be that the seller would pay more than he expected for the freight and the buyer would have to wait longer than he expected to receive the goods. It was considered by the Court of Appeal that these were not fundamental differences, and there was no frustration in the case of a c.i.f. contract.

There was also cited an American case, *Glidden Co.* v. *Hellenic Lines Ltd.*,[51] which was decided by the United States Court of Appeals, Second Circuit. There were charterparties for the transportation of ilmenite from India to "a United States Atlantic Port "north of Cape Hatteras." The voyage was to be "via Suez "Canal or Cape of Good Hope, or Panama Canal, at owners' "option declarable not later than on signing of bills of lading, to "one safe U.S. Atlantic Port North of Cape Hatteras, port at "charterer's option." There was a typewritten insertion that the charterer's option was "to be declared not later than on "vessel's passing Gibraltar." It was argued that that provision which had been inserted in typescript necessarily implied that the vessel must pass Gibraltar, and therefore must go through the Suez Canal and could not go by any other route. But the answer to that, in the construction of that particular contract, obviously, was that if one accepted that implication then it would mean that no meaning whatever was being given to the alternative expressly provided for via the Cape of Good Hope or Panama Canal. It was held that it could not be accepted that, upon the true construction of that contract, the voyage must necessarily be performed through the Suez Canal. It was held, therefore, that, when the Suez Canal was closed, that did not cause a frustration. In my view, that is merely an example of a particular charterparty being construed according to its terms, and the terms were different from those in the present case.

The next question is whether the shipowners are estopped from alleging the frustration. The special case deals with that, first of all, in paragraph 7 (4), which sets out the charterers' contentions on this point. It says: "If the charterparty was frustrated "the shipowners were estopped and precluded from so contending. "In this regard it was urged as follows: (i) When the vessel's "notice of readiness to load was given on November 9, 1956, the "shipowners knew that the Suez Canal was blocked and was "likely to remain blocked for a substantial period of time and "that the shortest practicable route was then via the Cape of "Good Hope. (ii) The shipowners permitted the vessel to be "loaded by the agents of the charterers and upon completion of "loading the bill of lading was issued by the shipowners. The bill "of lading incorporated the terms conditions liberties and exceptions of the charterparty and contained a specific stipulation "that it was subject to the lien clause (clause 21) thereof. (iii) "The shipowners permitted the vessel, loaded as aforesaid, to sail "from Masulipatan on November 19, 1956. (iv) On November "20, 1956, the shipowners by their representative intimated for "the first time to the representatives of the charterers at Genoa "the shipowners' contention that the charterparty had come to "an end because of the blocking of the Suez Canal. (v) At all "material times from November 9, 1956, the shipowners had "known that the Suez Canal was blocked and was likely to remain "blocked for a substantial period of time and the delay until "November 20, 1956, in intimating their aforesaid contention was "unexplained. (vi) In these circumstances (it was contended) "the shipowners represented: (a) that the charterparty was not "frustrated and that they were ready and willing to perform it "notwithstanding the blocking of the Suez Canal, (b) that they "were not going to insist on their strict legal rights by desisting "from further performance." That is the passage dealing with estoppel.

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[51] 275 F. 2d 253.

Then there are findings in paragraph 12, where the arbitrator says: "In so far as it is a question of fact I find and in so far as "it is a question of law I hold, subject to the decision of the "court on the questions of law set out in paragraph 14 hereof, "that the shipowners did not at any time represent by words or "conduct (i) that the charterparty was not frustrated; (ii) that "they were ready and willing to perform the charterparty notwithstanding the blocking of the Suez Canal; (iii) that, if the "cargo was loaded, it would be carried to Genoa at the charterparty rate of freight or on the charterparty terms; (iv) that they "would not insist on any of their legal rights in relation to the "carriage of the cargo from Masulipatan to Genoa; (v) that they "would not require to be paid a reasonable remuneration for "carrying the cargo to Genoa." The finding of the arbitrator in paragraph 13 (4) (a) was: "If (contrary to this view) the "charterparty was frustrated the shipowners are not estopped "and precluded from so alleging."

Now it is clear to my mind that there was no representation of fact such as could found any estoppel at common law. The subject of equitable estoppel is obscure and insufficiently developed. Reference was made to Halsbury's Laws of England, 3rd ed., vol. 15, p. 175, and to Anson's Law of Contract, 21st ed., pp. 103–105. Reference was made also to *Birmingham & District Land Co.* v. *London & North Western Ry. Co.*[52]; *Hughes* v. *Metropolitan Ry. Co.*[53]; *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.*[54]; and *Harnam Singh* v. *Jamal Pirbhai.*[55] In the last-mentioned case it may be that there was an estoppel at common law rather than an equitable estoppel, but it is not very clear which it was. However, I have looked at those cases. They are far removed from the present case. In my view, there has been no development of this comparatively new doctrine of equitable estoppel which is wide enough to cover the present case. Moreover, it may well be that the findings in paragraph 12 of the special case are in themselves sufficient to exclude the application of any equitable estoppel in the present case.

Next it is said that there is to be implied from the conduct of the parties an agreement—not a fictitious agreement, but an actual agreement—that the cargo would be carried from Masulipatan to Genoa by way of the Cape of Good Hope at the same rate of freight as that provided in the charterparty or on the charterparty terms. For that one has to read certain passages in the special case. Paragraph 7 (5) says: "If the charterparty "was frustrated, an agreement was in all the circumstances "(including those stated in sub-paragraph (13) of paragraph 5 "hereof [56] and in sub-paragraphs (i) to (v) of sub-paragraph (4) of

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[52] (1888) 40 Ch.D. 268, C.A.

[53] (1877) 2 App.Cas. 439, H.L.

[54] [1954] 1 W.L.R. 862; [1954] 2 All E.R. 28, C.A.; [1955] 1 W.L.R. 761; [1955] 2 All E.R. 657, H.L.

[55] [1951] A.C. 688.

[56] Paragraph 5 (13): "The charterers have paid to the shipowners "freight at the rate of 134s. per long "ton on 4,904·635 long tons. Such "payment was made in three instalments, namely, on November 26, "1956, on December 8, 1956, and on "April 23, 1957. The' instalment "paid on November 26, 1956, represented approximately 75 per cent. "of freight at the rate of 134s. per "long ton."

"this paragraph [57]) to be inferred between the shipowners and the "charterers that the cargo would be carried from Masulipatan to "Genoa via the Cape of Good Hope at the same rate of freight "as that provided in the charterparty or on the charterparty "terms." The arbitrator held that no agreement between the shipowners and the charterers was to be inferred that the cargo would be carried from Masulipatan to Genoa via the Cape of Good Hope at the same rate of freight as that provided by the charterparty or on the charterparty terms.

It is right to consider this question broadly. There might be a different formulation of the purport of the alleged agreement, for instance, to treat the charterparty as valid whether it was or not, or to proceed according to the terms of the charterparty notwithstanding that it might be invalid. Other formulations may be suggested. One must, however, look for an actual new agreement, with each party intending to make a new agreement, or, at any rate, so conducting himself that the other party could reasonably believe that he was intending to make a new agreement. Can one say that the shipowners, by their captain giving the notice of readiness to receive cargo, offered a new agreement to the charterers' agents, and that the charterers' agents, by tendering the cargo, accepted the offer? Or can one say that a new agreement was made by the charterers loading the cargo and by the captain receiving the cargo and starting the voyage with the cargo on board? The necessary acts and conduct are there if the intention to make a new agreement could be inferred. There are, however, no findings of fact to establish the supposed intention or apparent intention, the findings in paragraph 12 of the special case are adverse to it, and the probabilities are against it. It is probable that, either the parties thought that the original charterparty was still in force and were intending to perform it, or they did not know what the legal position was and they were trying to preserve the status quo. Moreover, the captain would not, unless expressly authorised by the shipowners, have any authority to enter into a new agreement on their behalf: Scrutton on Charterparties, 16th ed., p. 49; Carver's Carriage of Goods by Sea, 10th ed., p. 30. Want of authority was not pleaded as such, but, in view of the normal lack of such authority, it is improbable that the captain would intend, or be supposed by the other party to intend, to enter into such an agreement. The want of authority does come in as a factor of improbability, but only in that way.

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[57] Ante, p. 309.

There is the further point also that, if such an agreement were made, it would be an agreement to perform the long voyage round the Cape of Good Hope at a freight rate of 134s. per long ton; whereas, as found in the case, the reasonable freight rate for such a voyage would be 195s. per long ton, and it is improbable that the shipowners would make that unreasonable agreement.

With some reluctance, I feel compelled to reject the contention that there was such a new agreement to be inferred from the conduct of the parties. I say " with some reluctance " because the shipowners did, by giving the notice of readiness and receiving the cargo and starting the voyage, restrict the field of choice which might have been open to the charterers. When the shipowners on November 20 asserted frustration, the charterers could have accepted that view and had the cargo unloaded at Colombo. But they did not have the chance of finding a different ship or a different outlet for the goods at Masulipatan. However, if there was hardship on the charterers, it arose really from the frustrating event and not from any fault of the shipowners, who might well have to consider the position and take legal advice—in this case, in particular, on English law—before asserting frustration. It is not possible to find here any estoppel or any new agreement that the ship should make the voyage round the Cape of Good Hope at the original charterparty freight rate.

Finally, there is the agreement alleged by the shipowners for the payment of hire at a reasonable rate. On this point the shipowners' contention, as it is expressed in the special case, is this: " By November 9, 1956, or, at the latest, by November 13, 1956, " the charterparty was frustrated and in all the circumstances " (including the fact that between November 13 and 18, 1956, the " charterers by their agents tendered the cargo to the vessel for " loading and loaded the same) an agreement was to be inferred " between the shipowners and the charterers that the charterers " would pay a reasonable remuneration for the carriage of the " cargo from Masulipatan to Genoa and that such reasonable " remuneration was not less than 200s. per long ton delivered." The charterers contended that a reasonable remuneration for the carriage of the cargo was about 178s. per long ton delivered, but the arbitrator found the reasonable remuneration to be 195s., expressing himself thus: " If the charterparty was frustrated and " the shipowners are not estopped and precluded from so alleging, " an agreement is to be inferred between the shipowners and the " charterers that the charterers would pay a reasonable remunera- " tion for the carriage of the cargo from Masulipatan to Genoa.

"Such reasonable remuneration is at the rate of 195s. per long "ton delivered." In my view, there was no actual agreement to that effect. At the material time, which was from about November 9 to about November 20, 1956, neither party had any actual intention, or evinced any apparent intention, to make a new agreement. The shipowners' true claim is on a quantum meruit, which can be referred to, though perhaps not very aptly, as a fictitious agreement.

On that there is *Craven-Ellis* v. *Canons Ltd.*[58] The headnote reads: "The plaintiff was appointed managing director of a "company by an agreement under the company's seal which "also provided for his remuneration. By the articles of association of the company each director was required to obtain his "qualification shares within two months after his appointment. "Neither the plaintiff nor the other directors obtained their "qualification shares within two months or at all. The plaintiff "having done work for the company claimed to recover the "remuneration provided for in the agreement, or, alternatively, "on the basis of a quantum meruit. Held, that the fact that the "plaintiff did the work under an agreement which was in fact "void did not disentitle him from recovering on a quantum "meruit." Greer L.J. said[59]: "The obligation to pay reasonable remuneration for the work done when there is no binding "contract between the parties is imposed by a rule of law, and "not by an inference of fact from the acceptance of services. . . ." There are other relevant passages in the judgment of Greer L.J.,[60] and in the judgment of Greene L.J.[61] which was in agreement with that of Greer L.J.

Then, in *Hain Steamship Co. Ltd.* v. *Tate & Lyle Ltd.*,[62] there are some obiter dicta on what the position would be after a deviation had deprived the shipowner of the right to rely on, at any rate, certain provisions of the charterparty. Lord Atkin, Lord Wright and Lord Maugham were not prepared to accept the view taken in the Court of Appeal[63] that, in such an event, the shipowner could not recover any freight for his services. A view was indicated certainly by Lord Wright, and I think also by Lord Maugham, to the effect that in such a case the shipowner would have a right to recover reasonable remuneration on a quantum meruit.

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[58] [1936] 2 K.B. 403; 52 T.L.R. 657; [1936] 2 All E.R. 1066.

[59] [1936] 2 K.B. 403, 412.

[60] Ibid. 409, 410.

[61] Ibid. 414, 415.

[62] (1936) 52 T.L.R. 617; [1936] 2 All E.R. 597, H.L.

[63] (1934) 50 T.L.R. 415.

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Société Franco Tunisienne D'Armement v. Sidermar S.P.A.

Pearson J.

The present case is, to some extent, a fortiori. There was no breach of contract or other wrongful act by the shipowners. They carried the goods from Masulipatan to Genoa for the charterers' benefit and with the consent of the charterers. In my view, the law implies or imposes an obligation for the charterers to pay reasonable freight, and the amount of the reasonable freight is found in the special case.

I, therefore, decide the questions of law in favour of the shipowners, and paragraph 17 of the special case, which applies, is this: "(i) The charterers do pay the shipowners the sum of "£14,959 2s. 9d. together with interest thereon at £4 per cent. "per annum from February 16, 1957; (ii) the charterers do bear "and pay the whole of my said costs of the reference to me and "the whole of the said costs of this my award; (iii) if the shipowners shall in the first instance pay the whole or any part of "my said costs of the reference and of this my award, the "charterers shall forthwith refund to the shipowners the sum so "paid; (iv) the charterers do pay to the shipowners the whole of "the shipowners' own costs of the reference to [arbitration]."

Judgment for the shipowners, with costs.

Solicitors: *Holman, Fenwick & Willan; Crawley & de Reya.*

C. C. A.

1961 *May* 8.

Lord Parker C.J., Ashworth and Lawton JJ.

REGINA *v.* TERRY.

Crime—Homicide—Diminished responsibility—Direction to jury—Duty of judge to explain diminished responsibility—Medical evidence—Transcript of medical evidence handed to jury—Whether adequate direction—Homicide Act, 1957 (5 & 6 *Eliz.* 2, *c.* 11), *s.* 2.

The appellant was charged with the capital murder of a bank-guard whom he had killed during a bank raid. One defence raised was that he suffered from diminished responsibility under section 2 (1) of the Homicide Act, 1957.[1] In support of that defence two psychiatrists gave evidence, based on what the appellant had told them of his delusions, and which they accepted, that he was suffering from schizophrenia; they agreed, however, that if there were not those delusions, there was no other abnormality of mind. Two medical witnesses for the Crown gave evidence that the appellant was sane and that what he had told his psychiatrists was untrue. The judge did not sum up the medical evidence in detail but, having referred briefly to the two views expressed, handed a copy of the shorthand note of the medical evidence to the jury, inviting them to read it at their leisure. In his summing-up the judge read section 2 of the Homicide Act, 1957, to the jury, without explaining its terms, but after they had retired he recalled them and gave them a further direction. The jury convicted the appellant. On appeal:—

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[1] Homicide Act, 1957, s. 2 (1): "Where a person kills or is a party "to the killing of another, he shall "not be convicted of murder if he "was suffering from such abnormality "of mind (whether arising from a "condition of arrested or retarded "development of mind or any inherent causes or induced by disease "or injury) as substantially impaired "his mental responsibility for his acts "and omissions in doing or being a "party to the killing."

Held, that merely to hand a transcript of the medical evidence to the jury was a bad practice and in the ordinary case would not be an adequate direction; but that in this case, since the sole issue, which was plainly before the jury, was whether the story told by the appellant to his psychiatrists was genuine or whether he was shamming and it was untrue, there was no reason for a detailed summing-up of the medical evidence; and that, therefore, the court could not interfere with the conviction.

Per curiam. It is no longer proper merely to put the terms of section 2 (1) of the Homicide Act, 1957, before the jury, but they should be given a proper explanation of its terms as interpreted in *Reg.* v. *Byrne* [1960] 2 Q.B. 396; [1960] 3 W.L.R. 440; [1960] 3 All E.R. 1, C.C.A.

APPEAL against conviction.

The appellant, Victor John Terry, was convicted at Lewes Assizes, before Stable J., of the capital murder of one John Pull, a bankguard. He was indicted with three others, Hosier and Tucker, who were charged with non-capital murder, and a girl, Salter, charged with being accessory after the fact. The appellant had committed the killing in the course of a bank raid and at the trial one of the defences put forward was that he was suffering from diminished responsibility under section 2 (1) of the Homicide Act, 1957. In support of that defence, two psychiatrists, Dr. Paterson and Dr. Brown, gave evidence that in their opinion the appellant believed himself to be possessed by the spirit of a deceased American gangster, Jack Legs Diamond, and that that was consistent with schizophrenia. They also stated that there was a family history of epilepsy which would make the appellant unstable and more likely to be addicted to drugs and to have a tendency to schizophrenia. Both the witnesses had had interviews with the appellant, and accepted and based their evidence on what he told them. Other witnesses were called by the defence, who gave evidence that the appellant took drugs, and described incidents which could support the opinion of the psychiatrists. Two witnesses, Dr. Pearce and Dr. Brisby, who gave evidence for the Crown, expressed the opinion that the appellant was sane and that the story he had told his psychiatrists was untrue and was put on for the benefit of the doctors.

The judge, summing up to the jury, read section 2 of the Homicide Act, 1957, without giving them an explanation of its terms. Referring to the medical evidence, the judge said: "I "am not going to attempt to analyse these three volumes of "medical evidence; I am going to hand you the transcript of the "shorthand notes and you can study them at your leisure." He then told them that, without going through it in detail, they could take it that both Dr. Paterson and Dr. Brown had expressed the opinion that the appellant was suffering from an abnormality of mind induced by disease such as substantially to impair his mental responsibility, and went on to refer to the evidence of Dr. Pearce and Dr. Brisby that the appellant was putting on an act and was shamming, and said: "If you come to the conclusion "that this story that he told the psychiatrists of being moti-"vated and activated by the mind of Jack Legs Diamond is false, "that it is an act he has been putting on, then, members of the "jury, does not the whole defence of abnormality of mind fall "to the ground?" When the jury retired, they were handed the transcript of the medical evidence, of some 100 pages, which had been used by the judge and marked in places by him.

After the jury had retired, they were recalled by the judge and referred to various passages dealing with diminished responsibility in *Rose* v. *The Queen* [2] and *Reg.* v. *Byrne*.[3]

The appellant appealed against his conviction on the grounds, inter alia, that the judge failed adequately or at all to direct the jury upon the medical evidence, or to analyse or explain its worth and effect to them.

The facts are more fully stated in the judgment of the court.

M. A. B. King-Hamilton Q.C. and *J. Bolland* for the appellant. This was a case in which the medical evidence on the issue of diminished responsibility was of the greatest importance and it was highly desirable not only that the jury should have been reminded of it but that they should have had the benefit of a

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[2] [1961] A.C. 496; [1961] 2 W.L.R. 506; [1961] 1 All E.R. 859, P.C.

[3] [1960] 2 Q.B. 396; [1960] 3 W.L.R. 440; [1960] 3 All E.R. 1, C.C.A.

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meticulous summing-up. The evidence given on both sides should have been carefully reviewed and matters on which there was agreement, or a conflict of evidence, and admissions pointed out, as was done in *Reg.* v. *Spriggs*,[4] where each member of the jury was given a copy of the medical evidence. The course taken by the judge was wrong. The jury had to make their own analysis of the medical evidence and it was wrong that they should have had to do so on a major issue after a trial lasting eight days, and by means of a transcript of some 103 pages. The judge did not even tell the jury to study the transcript, and it is impossible to know whether they read it at all, or, if they did, whether they only read parts of it: they might only have read the evidence-in-chief of the experts for the Crown, or only the cross-examination of the defence witnesses. On an issue in which the onus is on the defence it is of vital importance that the judge should point out to the jury the evidence which tends to show that that onus has been discharged. The judge's omission to review the medical evidence was so fundamental as to justify this court in saying that the conviction cannot stand.

The judge misdirected the jury as to the law on the issue of diminished responsibility. It was common ground that the appellant knew what he was doing and that it was wrong and that, therefore, he was not insane within the M'Naughten Rules, but the judge did not accept that there is a no-man's land between sanity and insanity in which a man may know what he is doing and that it is wrong and yet not be legally sane. The judge's failure to direct the jury on the lines stated in *Rose* v. *The Queen*[5] amounted to a serious misdirection.

[Lord Parker C.J. At the end of the day, was not the real question whether what the appellant had told his psychiatrists was to be believed? If it was to be believed, then clearly he was suffering from diminished responsibility. If he was putting on an act, then there was little to satisfy the jury that there was diminished responsibility.]

That made it all the more necessary for the judge to remind the jury of the evidence of other factors tending to support his case which did not depend on the appellant's story at all: it was not correct to say that the expert witnesses for the defence based their views on the story told them by the appellant alone. That failure to remind the jury of the evidence of those other factors supporting the view put forward by the experts for the defence was a further misdirection.

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[4] [1958] 1 Q.B. 270; [1958] 2 W.L.R. 162; [1958] 1 All E.R. 300, C.C.A.

[5] [1961] A.C. 496.

There was also misdirection on the issue of accident, and it is submitted that this summing-up was wrong in so many respects that the verdict should not stand. The court is asked to substitute a verdict of manslaughter.

Geoffrey Lawrence Q.C. and *Petre Crowder*, for the Crown, were not called on for argument on the direction as to the law of diminished responsibility.

The only evidence to support the defence of diminished responsibility was the evidence of what the appellant had told his psychiatrists, and the real and only issue of fact was whether what he had told them was credible or whether he had put forward to them a story to support a case which he hoped they would accept. The summing-up must be looked at as a whole—as a summing-up on the broad issue between the medical witnesses, namely, whether the appellant was shamming and fooling his own psychiatrists, and in the context of the case. Had the judge gone into details of all the points raised in the medical evidence, the summing-up would have been out of proportion in relation to that one real issue. Although some judges might have gone into greater detail, in the circumstances it was unnecessary here to do so, and it is doubtful whether, after a trial of eight days, it would have been appreciated by the jury. A proper direction was given on section 2 of the Act of 1957 and the jury were reminded that it had been suggested that the abnormality of mind was induced by disease or drugs. Further, the judge directed the jury, in the appellant's favour, that, if there was abnormality of mind induced by disease, he would not be deprived of the defence of diminished responsibility because it had been exacerbated by drugs or alcohol, and he contrasted the position of a person who had taken drugs or alcohol in order to give himself Dutch courage.

The judge did in fact summarise the effect of the medical evidence on both sides, and the handing of the transcript to the jury was supplemental to that.

[They were stopped.]

King-Hamilton Q.C. in reply. The summing-up was unsatisfactory in a case of this gravity. The jury were told, in effect, to sum up and analyse the medical evidence for themselves. Moreover, the transcript of the medical evidence was marked; certain passages were heavily scored and some pages were turned down, and the jury may well have read only those passages. Part of the evidence on the issue whether the appellant was shamming was the medical evidence itself, and the judge should have pointed out to the jury those parts of it which went to show that the appellant was not shamming. He should also have pointed out the criticism by the appellant's expert witnesses of the evidence of the experts for the Crown. Reliance is placed on the failure to draw the attention of the jury to the evidence on this issue which did not emanate from the appellant. It was also necessary, on that issue, for the judge to have dealt more fully with the question of drugs, since it was common ground that the appellant was taking them and that their effect was indistinguishable from that of schizophrenia.

LORD PARKER C.J. This appellant, Victor John Terry, was convicted at the Sussex Assizes of the capital murder of one Pull, on November 10, 1960. From that conviction he now appeals to this court.

The short facts, so far as it is necessary to state them, are as follows: The killing was committed by the appellant in the course of a raid on a bank at Worthing, a branch of Lloyds Bank. The raid was made as the result of a carefully pre-arranged plan between the appellant and two other youths, Tucker and Hosier. They all lived in London, but the appellant had apparently worked in Worthing for a short time that year. On November 9, 1960, the day before the raid, they bought a shot gun and ammunition in London, and one of them, Hosier, took and drove away a parked Wolseley car without the owner's consent. Soon after the bank opened on November 10, 1960, about two minutes past ten o'clock, the three of them went to the bank in the car. Hosier stayed outside in the car, and the appellant and Tucker went inside. The appellant had the gun with him at the time loaded and cocked. There was a young cashier called Barker there. The two of them walked past him and down a passage to a space at the back where there was a safe, and it was at that moment that the deceased man, Pull, who had been in a cloakroom, emerged from the cloakroom carrying a kettle. Pull apparently had a slight mannerism that when he was about to talk to anybody he would raise his hand shoulder high, and on this occasion, faced with two strangers, and particularly the appellant, he apparently raised his hand and, on the evidence, he did actually touch the appellant. The appellant appeared then to draw back and to raise the gun. The gun was fired pointing slightly upwards and the full shot went into Pull's left eye. He fell to the ground and died shortly afterwards. The appellant and Tucker then turned to the young cashier and said something like: "Where is "the money?" and they seized a bag containing over £1,000 in cash. They went out to the waiting car and drove away. On those bare facts it is plain that this is a case of murder in the course of theft, and a very deliberate one.

The defence was twofold; first, that the gun had gone off by accident, and secondly and alternatively, that the appellant was suffering from diminished responsibility within section 2 of the Homicide Act, 1957, two defences which do not run easily in double harness. [His Lordship considered the summing-up in regard to the defence of accident and continued:] The court can see nothing there which would cause any reason for interference with the conviction.

The second defence, diminished responsibility, was advanced by two eminent psychiatrists for the defence, Dr. Paterson and Dr. Brown. The appellant had many interviews with them. He told Dr. Paterson at any rate, and I think Dr. Brown, although Dr. Brown may merely have read Dr. Paterson's report, a long story of his history from his childhood onwards down to the date and time of the killing. It is unnecessary to go into it in any detail, but the story was that for years he had not felt at all normal. In one passage he said that he felt doomed at 13, and he had a feeling of being possessed at 15, and when he was asked: "So your whole outlook is different when you are the "real you from when you have the feelings?" he said: "Yes, "but when I am normal I still think that I was born to be "doomed, but I cannot think why I want to be a great gang-"ster." For the relevant period, that is, from November 9, 1960, down to November 13, 1960, when he was arrested, he told the story that, except for five minutes in a cinema at Portsmouth, he had felt that he was possessed by the spirit of a deceased American gangster, one Jack Legs Diamond, whose commands in effect he had to obey even if he knew what he was required to do was wrong. He said that he had had that feeling for a number of years.

The psychiatrists also spoke of a family history of epilepsy which they said would make him an unstable personality, one liable to be addicted to drugs and one in whom schizophrenia would more easily develop. They also spoke of the history which they had been given, not solely by the appellant but by other witnesses, of his having taken drugs for a period of at any rate some five months.

If we understand it aright, Dr. Paterson was saying: This young man was suffering from abnormality of mind, the abnormality being the delusion that he was possessed by another or, as it was sometimes put, that he was living in a dream world. Dr. Paterson said that that was induced by schizophrenia aggravated by drugs and rendered more likely by epilepsy in the family. Finally, he expressed the opinion that thereby the appellant's ability to control his acts was impaired and substantially impaired.

Dr. Brown also proceeded on the basis that, having heard the appellant's story, it was clear that he was suffering from delusions, and that those delusions amounted to an abnormality of mind. As regards the disease he expressed it rather differently by saying that the appellant was "an extremely psychopathic "personality who has had episodes of a schizophrenic type of "psychosis, especially under the influence of drugs." He did, however, add that but for the drugs the killing would not have taken place. Both these psychiatrists had to rely on what they were told by the appellant. They said they accepted his story. They did not think he was shamming, and it was on his story almost entirely that they based their evidence. As against that, Dr. Pearce and Dr. Brisby, who were called for the Crown, were emphatic that the appellant had throughout been putting on an act for the benefit of the psychiatrists, in other words, that he was shamming.

The summing-up by the judge in regard to diminished responsibility has been criticised in a number of respects. Perhaps the most serious criticism is that not only in the first instance did the judge merely refer without explanation to the words of section 2 of the Homicide Act, 1957, but that he made little attempt to review the medical evidence in detail. Thus he said: "Members of the jury, I am not going to attempt to analyse "these three volumes of medical evidence; I am going to hand "you the transcripts of the shorthand note and you can study "them at your leisure"; and at the end of his summing-up: "Members of the jury, that concludes all I have to say to you. "Here are the transcripts of the medical evidence, which I will "hand to you. I am afraid there is only one copy for you; but "you can study the whole thing and analyse it."

The court would like to say emphatically that they disapprove of such a practice. It is true that in 1958 in *Reg.* v. *Spriggs*,[1] this court laid down that it was sufficient for the judge to hand copies of section 2 to the jury without any further explanation of the terms of the section; but it is to be observed that in that case the judge went with meticulous care into the evidence given on one side and the other, reviewing it in detail. In the present case it is said that the judge really went further than that, because not only in the first instance did he only refer to the section, but he made no attempt to make a meticulous and careful review of the medical evidence. In the opinion of this court, ever since *Rose* v. *The Queen*[2] in the Privy Council, it is not sufficient merely to refer to the words of the section. That decision referred with approval to the interpretation that this court put on the section in *Reg.* v. *Byrne*,[3] and in the light of that interpretation it seems to this court that it would no longer be proper merely to put the section before the jury, but that a proper explanation of the terms of the section as interpreted in *Reg.* v. *Byrne*[3] ought to be put before the jury. In fairness, however, to the judge, it must be stated that after the jury had retired he called them back and did read out to them various passages from the two cases mentioned above.

So far as the handing of the transcripts of the medical evidence to the jury is concerned, the court feels that that is a bad practice and, in an ordinary case, would not be an adequate direction to the jury in regard to the medical evidence. Medical evidence on these matters is difficult to follow and difficult to understand, and it would be quite impossible for a jury in a jury room without any assistance really to understand and appreciate the effect of the evidence. The practice was made worse in the present case in that only one transcript was available, and that a transcript which had been marked by the judge in red pencil and with pages turned down. That, as it seems to this court, is an objectionable practice.

Other criticisms made of this summing-up are that the judge did not adequately refer to the medical evidence in regard to drugs, in regard to the family history and matters of that sort. The court feels that in an ordinary case there would be considerable ground for those matters of criticism, but this is in some ways a rather curious case. It went on for some eight days, and no less than 100 pages of the transcript are occupied with this medical evidence, but at quite an early stage it became clear that the opinions formed by Dr. Paterson and Dr. Brown were in the main the result of the story which the appellant had told them. Thus, it is to be observed that early on in the cross-examination of Dr. Paterson, Mr. Lawrence, in going through the necessary ingredients of section 2, began to ask him about the abnormality of mind which he suggested was there: "(Q.) What "is the abnormality of mind which you say this man was suffer-"ing from at the time when he committed these acts? (A.) That "he had a delusion that he was possessed by another person—by "a spirit. (Q.) Anything else? (A.) No, that is the main thing. "(Q.) That is the abnormality? (A.) Yes. (Q.) I do not know "whether that has got anything to do with schizophrenia or not—"has it? (A.) Yes, it has. (Q.) Then we will examine its con-"nection in a moment; but let us concentrate for the moment on "the abnormality. That is an abnormality of mind that can have "absolutely no effect in this case at all unless it was genuine? "(A.) Yes, quite. (Q.) In other words, it is a delusion which is "subjective to Terry himself? (A.) Yes. (Q.) If in fact objec-"tively—and it is the jury who have to determine the state of "this man's mind—he was not suffering from any such delusion "at all, then we need not trouble about any of the other words "in the section, need we? (A.) No."

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[1] [1958] 1 Q.B. 270; [1958] 2 W.L.R. 162; [1958] 1 All E.R. 300, C.C.A.

[2] [1961] A.C. 496; [1961] 2 W.L.R. 506; [1961] 1 All E.R. 859, P.C.

[3] [1960] 2 Q.B. 396; [1960] 3 W.L.R. 440; [1960] 3 All E.R. 1, C.C.A.

A little later on he was referred to the answer that he had given: "(Q.) Then I put to you that it followed that if there never was "such a delusion, there was then no abnormality of mind? "(A.) I do not say that it follows; I do not think it follows that "there is no abnormality of mind." Then it became quite clear from the questions of the judge that the witness was not appreciating the question, and the judge then said: "(Q.) Now will "you apply your mind to the hypothesis that Mr. Lawrence is "putting to you? He is simply putting it as an hypothesis; he "is not asking you to accept the position that this man was not "living in a dream world, but on the hypothesis that he was not, "is there any other abnormality of mind?" and the answer was: "No, my Lord." Later on in the cross-examination the matter became still more clear because a time was reached when the judge said to Mr. Lawrence: "Mr. Lawrence, I imagine the "jury would agree with the proposition that if Terry's story was "true and the whole of this operation was carried out by him "while he really thought he was 'Legs' Diamond, a distinguished Chicago gangster, obviously they would not be able to "hold him responsible for what he was doing, if that story is "true." Mr. Lawrence, in answer, said: "If it is true, yes, my "Lord." Then he asked a question of the witness in these terms: "So we are getting down to the rival views, the other "view of the matter that this is an ordinary case of full responsibility of the criminal, who planned it deliberately risking the "consequences of not resisting the temptation to commit "crime?" He answered: "Yes. (Q.) And the whole thing ultimately depends, does it not, on whether what Terry is putting "up to the psychiatrist is believable or not? (A.) Yes."

It is perfectly clear, therefore, that at the end of the eight days and when the jury retired, the real and only question was: Was Terry fooling his psychiatrists or was his story a genuine story? If it was a genuine story, it was clear, as the judge himself said, that on the evidence he must be suffering from diminished responsibility. On the other hand, if he was fooling the psychiatrists, there was Dr. Paterson saying: "There is no other "abnormality of mind other than these so-called delusions to "which I can refer." In the light of what clearly, therefore, was the question in the end, it seems to this court that the summing-up by the judge is quite unexceptionable. Thus, he told the jury that without, as it were, going through the medical evidence in detail, they can take it that both Dr. Paterson and Dr. Brown had unequivocally expressed the opinion that Terry was suffering from an abnormality of mind induced by disease such as substantially to impair his mental responsibility. Having said that, the judge then went on to refer to the emphatic evidence of Dr. Pearce and Dr. Brisby that the appellant had put on an act and was shamming. Having dealt with that, the judge said: "If you "come to the conclusion that this story that he told the psychiatrist of being motivated and activated by the mind of Jack Legs "Diamond is false, that it is an act he has been putting on, then, "members of the jury, does not the whole defence of abnormality "of mind fall to the ground?"

It is said by Mr. King-Hamilton, to whom the court is indebted for his argument, that even if that were the real issue at the end, yet the judge's summing-up failed in two respects. First, it is said that even if the appellant's story of his delusions was not to be accepted, there was other evidence which came from independent sources, independent of the appellant, which pointed in that direction and to which the judge should have referred. I need not refer to the points in detail, but they were matters such as the fact that he had had eleven jobs in two years, that for some reason or another his father at one period thought he ought to see a psychiatrist, that there was evidence that he was seen for six minutes with his arms rigid, flexing his muscles looking into a mirror, which it was said was a catatonic episode, and there were other matters of that sort. It is sufficient to say that the burden of proof is put upon the defence, and that none of these matters were matters of such substance as required reference being made to them by the judge, particularly having regard to the answers which I have referred to which Dr. Paterson had made in cross-examination.

Secondly, it is said, and this is really the high-water mark of what can be said, that the judge, at any rate on this real live issue as to whether the appellant was putting on an act or not, ought to have given the jury detailed directions about it. The court has come to the conclusion that there was very little that the judge could say. The matter had been going on for eight days. The sole issue for the jury was whether they accepted Dr. Paterson and Dr. Brown in saying that in their opinion he was not putting on an act, or whether they accepted Dr. Pearce and Dr. Brisby in being certain that he had been putting on an act. The court feels that in the circumstances of this case, that being the sole issue, there was little more that the judge could reasonably be expected to do.

The court has given this matter anxious consideration. They are indebted for the arguments of counsel on both sides but, having fully considered the matter, they can find no ground to interfere. Accordingly, the appeal is dismissed.

King-Hamilton Q.C. asked the court to certify under section 1 of the Administration of Justice Act, 1960, that a point of law of general public importance was involved in the decision.

LORD PARKER C.J. The court feels unable to certify that there is a point of law of general public importance involved and, accordingly, no question of an appeal to the House of Lords arises.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

J. F. L.

1961
April 19.

Lord Parker C.J., Gorman and Salmon JJ.

SANDERS *v.* SCOTT.

Road Traffic—Notice of intended prosecution—Service of notice—Driver not served—No evidence whether registered owner served—Burden of proof—Road Traffic Act, 1960 (8 *&* 9 *Eliz.* 2, *c.* 16), *s.* 241 (2) (3).

The defendant was charged with driving a motor-vehicle in a manner dangerous to the public, contrary to section 2 (1) of the Road Traffic Act, 1960. The defendant was the driver of the motor-vehicle concerned at the time of the alleged offence but was not the registered owner thereof. No warning of intended prosecution was given to the defendant at the time, nor was a summons issued within 14 days, nor was notice of intended prosecution under section 241 (2) of the Road Traffic Act, 1960,[1] served on him at any time, although his identity and address were known to the prosecution. There was no evidence whether or not such a notice had been served on the registered owner of the motor-vehicle. The justices were of opinion that, as no notice under section 241 was served on the defendant, and there was no evidence that notice had been sent to any other person, the requirements of the section had not been complied with, and they dismissed the information. On appeal:—

Held, that section 241, which provided a technical defence, must be construed strictly, and subsection (3) placed the burden on the defence to show that its requirements had not been complied with; that, under subsection (2) (*c*), there were two complete alternatives and the notice could be served either on the driver or the registered owner of the vehicle, so that as the defendant had not called the registered owner or proved that no notice had been served on him, he had not discharged the burden of proof; and that, therefore, the justices were wrong in dismissing the information.

CASE STATED by Blackpool justices.

On October 11, 1960, an information was preferred against the defendant, Richard Norman Scott, that on July 29, 1960, he drove a motor-vehicle in a manner dangerous to the public, contrary to section 2 (1) of the Road Traffic Act, 1960.

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[1] Road Traffic Act, 1960, s. 241: "(2) Subject to the following provisions of this section, where a person is prosecuted for an offence to which this section applies he shall "not be convicted unless either— "(*a*) he was warned at the time the "offence was committed that the question of prosecuting him for some one "or other of the offences to which this "section applies would be taken into "consideration; or (*b*) within fourteen "days of the commission of the "offence a summons . . . for the "offence was served on him; or (*c*) "within the said fourteen days a "notice of the intended prosecution "specifying the nature of the alleged "offence and the time and place "where it is alleged to have been committed, was—(i) . . . served on or "sent by registered post to him or "the person, if any, registered as the "owner of the vehicle at the time of "the commission of the offence . . . "(3) The requirement of the last "foregoing subsection shall in every "case be deemed to have been complied with unless and until the contrary is proved."

The following were among the facts found by the justices: The events giving rise to the issue of the information occurred on July 29, 1960, and the defendant was the driver of the motor-vehicle concerned at the time of the alleged offence but was not the person registered as the owner thereof at that time. No warning of intended prosecution was given to the defendant at the time of the alleged offence, nor was notice of intended prosecution under section 21 (*c*) of the Road Traffic Act, 1930, now repealed and replaced by section 241 (2) of the Road Traffic Act, 1960, served on him at any time. The prosecutor was aware of the identity and the permanent and usual address of the defendant on August 5, 1960, seven days after the events giving rise to the issue of the summons. No evidence was called by the prosecutor.

It was contended by the prosecutor that although the defendant had proved that the notice of intended prosecution was not served on him, he did not prove nor seek to prove that notice was not served on the person registered as the owner of the motor-vehicle at the time of the alleged offence, and as the requirement as to notice shall in every case be deemed to have been complied with unless and until the contrary is proved under section 21 (ii) of the Road Traffic Act, 1930, as replaced by section 241 (3) of the Road Traffic Act, 1960, the defendant did not discharge the burden cast on him under that subsection.

It was contended by the defendant that the prosecutor was aware of his identity and permanent and usual address on August 5, 1960, and as no warning of intended prosecution was given to him at the time of the offence and no notice of intended prosecution had been served on him the requirements of section 21 (*c*) of the Road Traffic Act, 1930, had not been complied with.

The justices were of the opinion that as the prosecution were aware on August 5, 1960, of the identity and permanent address of the driver of the vehicle the notice of intended prosecution should have been sent to him in compliance with the section of the Road Traffic Act, and as there was no evidence before them that the required notice had been sent to any other person, they came to the conclusion that the requirements as to notice had not been complied with by the prosecutor in accordance with section 21 (*c*) of the Act of 1930, and, accordingly, they dismissed the information.

The prosecutor appealed.

R. E. Hammerton for the prosecutor. The justices decided that the information should be dismissed because the defendant proved that no notice of intended prosecution had been served on him as the driver of the vehicle although his identity and address were known to the police, and no evidence was tendered to show whether or not such a notice had been served on the registered owner of the vehicle. The justices were wrong in coming to that conclusion. Section 241 (2) (*c*) (i) of the Act of 1960 provides that a notice of intended prosecution shall be served on or sent by registered post to the person prosecuted, or, alternatively, to the registered owner of the vehicle—and those are complete and separate alternatives; subsection (3) provides that the requirements of section 241 (2) shall be deemed to have been complied with unless the contrary is proved; it is, therefore, for the defendant to prove that neither the driver of the vehicle nor the registered owner of it was served with a notice of intended prosecution, and he did not prove the latter.

The same point arose in *Rogerson* v. *Edwards*,[2] where a company with the same name and carrying on business in the same road as the owners of the vehicle was mistakenly served with a notice of intended prosecution; in that case no evidence was called by the defendant that neither the owners nor the driver had been served with the notice. The justices nevertheless held that the requirements as to notice had not been complied with. On appeal by the prosecution, it was held that, since section 21 (ii) of the Road Traffic Act, 1930 (now re-enacted by section 241 (3) of the Act of 1960), required that a notice of intended prosecution should be deemed to have been served, it was not for the prosecution to prove service, and the appeal was allowed. The court left undecided whether the prosecution should prove that the identity of the driver was not known to them before serving the notice on the registered owner, although Lord Goddard C.J. inclined to the view that that was unnecessary.

In the present case the defendant did not establish that a notice had not been served on the registered owner, and the justices should therefore have heard the charge.

The defendant did not appear and was not represented.

Lord Parker C.J. This is an appeal by way of case stated by justices acting in and for the County Borough of Blackpool, before whom an information was preferred by the prosecutor against the defendant that on July 29, 1960, he drove a motor-vehicle in a manner dangerous to the public, contrary to section 2 (1) of the Road Traffic Act, 1960.

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[2] [1951] W.N. 101; 49 L.G.R. 358, D.C.; 95 S.J. 172.

The justices dismissed the information, having come to the conclusion that the requirements with regard to notice of intended prosecution of section 21 of the Act of 1930, now section 241 (2) of the Act of 1960, had not been complied with. The defendant was the driver of the motor-vehicle at the time of the alleged offence. No warning of intended prosecution was given to him at the time, nor was a summons issued within 14 days, nor was a notice of intended prosecution served upon him within 14 days or at all. The defendant, having given evidence of that, submitted that the provisions of the section had not been complied with. At that point the police officer dealing with the case did not go into the witness-box and say, as indeed he might have said: "All that is very true, but I did "serve the registered owner," which is an alternative to serving the driver under the subsection. In fact he did not do that, but contended before the justices that, the burden being on the defence to show that the provisions of the section had not been complied with, it had not been shown that a notice of intended prosecution had not been served on the registered owner.

The section, and it is convenient to take section 241 (2) of the Act of 1960, provides: "(2) Subject to the following provisions of "this section, where a person is prosecuted for an offence to which "this section applies he shall not be convicted unless either— ". . . (*c*) within the said fourteen days a notice of the intended "prosecution specifying the nature of the alleged offence and the "time and place where it is alleged to have been committed, "was . . . served on or sent by registered post to him or the "person, if any, registered as the owner of the vehicle at the time "of the commission of the offence." By subsection (3) it is provided: "The requirement of the last foregoing subsection shall "in every case be deemed to have been complied with unless and "until the contrary is proved."

The justices in this case, and I have some sympathy with them, said this to themselves: "The police knew full well the "name and address of the driver, and where to get at him. "They never did serve him. What is more, the police officer "is here, and if the registered owner had been served he would "have told us so." In those circumstances, they said that they were not satisfied that the requirements of section 241 (2) of the Road Traffic Act, 1960, had been complied with, and

Lord Parker C.J.

dismissed the information. I have some sympathy with them, but I think that the section must be looked at strictly. It is laying down a technical defence and it is putting the burden on the defence to show that the provisions of the section have not been complied with. The notice of intended prosecution can be served either on the driver or on the registered owner. It does not say that it can be served on the driver or, if the name and address of the driver are not known, on the registered owner. There are two complete alternatives and, by section 241 (3) the defence must show that neither alternative has been complied with. The proper way of doing that is for the driver to give evidence that no notice was served on him and to call the registered owner in turn to say that he had not been served.

In those circumstances, much as I sympathise with the justices, I do not think that the proof required by subsection (3) was forthcoming and, accordingly, there was no ground on which they could dismiss the information, and the case must go back to them with a direction to hear and determine the charge.

GORMAN J. I agree completely. In the case stated before us the justices say: " We were of the opinion that as the prosecu-" tion were aware on August 5, 1960, of the identity and " permanent address of the driver of the vehicle the notice of " intended prosecution should have been sent to him in com-" pliance with the section of the Road Traffic Act." Whether that was the intention behind the framers of this Act or not, I do not know, but there is nothing in the section with which we are concerned to decide in what circumstances the notice shall be served on the driver or, alternatively, on the registered owner. The justices may well have thought that since the prosecution knew the address of the driver, they ought to have served him; but that is not in accordance with the Act. Then they go on further to say: " . . . and as there was no evidence before us " that the required notice had been sent to any other person we " came to the conclusion that the requirements as to notice had " not been complied with by the appellant." There again, I feel that the justices are in error because, as my Lord has said, it is provided by section 241 (3), which relates to the sending of notice either to the driver or registered owner that, " The requirement " of the last foregoing subsection shall in every case be deemed " to have been complied with unless and until the contrary is " proved." I agree completely with my Lord that the justices were in error in finding as they did, but it is an error which is quite understandable in the circumstances of this case.

SALMON J. I agree.

Appeal allowed with costs.

Solicitors: *Sharpe, Pritchard & Co. for A. C. Brewer, Blackpool.*

J. F. L.

CLARKE *v.* HALL.

1961
Mar. 20, 21.

Widgery J.

[1960 C. No. 3052.]

Agriculture—Agricultural holding—Notice to quit—Death of tenant—Tenancy assigned before death—Whether original tenant or assignee "tenant with whom the contract of tenancy was made"—"Tenant"—Meaning—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 24 (2) (*g*).

On April 12, 1950, the tenant of certain agricultural land under a yearly tenancy from March 25, 1948, with the consent of the landlord, executed an assignment assigning to her son, the defendant, for a consideration of £5, all the premises comprised in the original tenancy agreement and the benefit of the tenancy thereby subsisting to be held by him but subject to the stipulations of the original tenancy agreement. By a further document under seal executed between the landlord and the defendant, the landlord consented to the assignment to the defendant with benefit of the tenancy created by the original agreement. Thereafter the defendant occupied the land for agricultural purposes. On February 15, 1959, the defendant's mother died, and on March 19 the landlord served on the defendant a notice to quit the premises on March 25, 1960. The notice stated that it was given by reason of the death of the tenant with whom the contract of tenancy had been made within three months before the date of the giving of the notice to quit and on the ground of such death (in accordance with section 24 (2) (*g*) of the Agricultural Holdings Act, 1948[1]), and that, accordingly, section 24 (1) of the Act did not apply. On April 2, 1959, the defendant's solicitors served a counter-notice, expressing the opinion that in view of the deed of assignment the defendant was the tenant and the death of his mother did not affect his tenancy. Shortly after March 25, 1960, the defendant removed most of his stock from the land but returned it on May 23 and thereafter asserted his full right to occupation of the land.

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[1] Agricultural Holdings Act, 1948, s. 24 (1): "Where notice to quit an "agricultural holding . . . is given to "the tenant thereof, and not later than "one month from the giving of the "notice to quit the tenant serves on "the landlord a counter-notice in "writing requiring that this sub-"section shall apply to the notice to "quit, then, subject to the provisions "of the next following subsection, "the notice to quit shall not have "effect unless the Minister * consents "to the operation thereof. (2) The "foregoing subsection shall not apply "where— . . . (*g*) the tenant with "whom the contract of tenancy was "made had died within three months "before the date of the giving of the "notice to quit, and it is stated in "the notice that it is given by reason "of the matter aforesaid."

* The Agriculture Act, 1958, s. 3 (1), transferred the functions conferred on the Minister to the Agricultural Lands Tribunal.

In an action by the landlord for possession, damages and an injunction to restrain the defendant from trespassing on the land:—

Held, (1) that the two documents executed in 1950 were entirely consistent with the defendant becoming the tenant under the old tenancy and being regulated by its terms, and accordingly the contract of tenancy within the context of section 24 (2) (*g*) was the original contract of letting to the defendant's mother, who was the individual with whom that contract was made.

(2) That the clear meaning of the words of section 24 (2) (*g*) was that the landlord might serve notice to quit if the individual who was the tenant with whom the contract of tenancy was made had died within the previous three months, the "tenant" referred to therein being someone who was not now the tenant because he or she was dead, but someone who had been the tenant on a former occasion, and there was no reason to confine the words of paragraph (*g*) so as to require that the tenant referred to should still have been the holder of the estate at the date of his death. Accordingly, the notice to quit was valid and the tenancy had been determined on March 25, 1960.

ACTION.

The following statement of facts is summarised from the judgment.

The plaintiff, John Eric Clarke, was the owner of certain agricultural land known as "Tanyard Land" in the parish of Frittenden in the county of Kent, which he bought in 1948, together with certain other land in the vicinity. At the time the defendant, William Howard Hall, was the tenant of Tanyard Land. The plaintiff was anxious to recover part of the premises then let to the defendant, and eventually the parties reached agreement as to the part of the land the defendant was to give up, and it was agreed that the terms of the new agreement should be contained in a new agreement of tenancy. The plaintiff was a solicitor and, although not acting as solicitor for the defendant at any material time, it was agreed that he should prepare the tenancy agreement without charge to the defendant, save that they would bear the stamp duty equally between them. The defendant then requested that the tenancy should be granted to his mother, Edith Elsie Hall, instead of to him, and, as the plaintiff agreed, the tenancy agreement was prepared and executed by the plaintiff and the defendant's mother. The tenancy was a normal agricultural yearly tenancy from March 25, 1948, at a rent for the 50 or so acres comprised in the letting of £70 per annum. There was no covenant or condition against assigning or subletting by the tenant. In 1950 the defendant informed the plaintiff that he would like the tenancy of the land to be in his own name. The plaintiff agreed that that could be done but said that a licence to assign from him to the defendant would be necessary. It was not suggested that the plaintiff had an intention to mislead but, in fact, no such licence was necessary. The plaintiff accordingly prepared two documents for execution by the parties. One, dated April 12, 1950, was an assignment whereby the defendant's mother assigned to the defendant for a consideration of £5 all the premises comprised in the original tenancy agreement, and the benefit of the tenancy thereby subsisting, to hold unto the defendant subject to the terms, conditions and stipulations of the original tenancy agreement (which was recited), and henceforth on the part of the defendant to be so observed and performed. The other document, which was under seal, between the plaintiff and the defendant read as follows: "In the matter of an agreement dated July 20, 1948, "and made between John Eric Clarke and Edith Elsie Hall being "a tenancy from year to year from March 25, 1948, of Tanyard "Land, I, John Eric Clarke of Cranbrook in the County of Kent "solicitor being the present landlord of the property comprised "in the said agreement hereby consent to the said Edith Elsie "Hall assigning Tanyard Land comprised in the said agreement "to William Howard Hall of Biddenden in the County of Kent "farmer with the benefit of the tenancy created by the said "agreement. I, William Howard Hall hereby covenant with the "said John Eric Clarke not to assign charge underlet or part with "the premises known as Tanyard Land or any part thereof or the "benefit of the said agreement." Nothing was provided in that agreement which would make the proviso for re-entry in the original tenancy agreement exercisable in the event of a breach by the defendant of his covenant not to assign, which was contained in the licence.

Following the execution of those documents the defendant occupied the land for agricultural purposes, mainly pasturage. On February 15, 1959, Mrs. Hall died, and on March 19, 1959, the plaintiff served upon the defendant a notice to quit the premises on March 25, 1960. The notice to quit stated that it was given by reason of the death of Edith Elsie Hall (the tenant with whom the contract of tenancy was made) within three months before the date of the giving of the notice to quit and on the ground of such death and, accordingly, section 24 (1) of the Agricultural Holdings Act, 1948, did not apply. It was common ground that that notice was properly served and had no technical defect.

On April 2, 1959, the defendant's solicitors wrote to the plaintiff enclosing a counter-notice under section 24 (1) of the Act of 1948, and expressing the opinion that in view of the deed of assignment executed in April, 1950, the defendant was the tenant and the death of his mother did not affect the tenancy. After correspondence between the parties, on February 1, 1960, at the request of the defendant, one Major Leslie Chalk, a friend of the defendant's and an experienced land agent, met the plaintiff to try to persuade him that the notice to quit was invalid (the view which he himself held), and, if not, to see whether some other modus vivendi might be arrived at to enable the defendant amicably to retain the use of the land or some part of it, but the plaintiff maintained his position.

Shortly before February 25, 1960, the plaintiff gave notice to the defendant that he was proposing to make a claim for compensation under section 58 of the Agricultural Holdings Act, 1948, in respect of depreciation of the holding, a notice which, under the Act, had to be given at that time, assuming that the tenancy was coming to an end on March 25. The defendant, whilst not giving up hope of being able to retain possession, thought it wise to allow the machinery of claim and counter-claim in relation to section 58 to take its course, in case the tenancy was proved in fact to have been validly determined on March 25. Accordingly, Major Chalk, on behalf of the defendant, wrote to the plaintiff, referring to the notice, and setting out the defendant's claim upon quitting, namely, for tenant's pasture, unexhausted manurial values of fertilisers applied, and feeding-stuffs fed and for one field gate.

On March 25, 1960 (the date when the tenancy would determine if the notice was valid), the defendant had upon the land a substantial number of ewes, some hay and some items of dead stock comprising five or six new sheep troughs, a new sheep rack, a hay-loader and trailer, but on March 28 he removed from the land to his farm some miles away the great bulk of his flock, leaving behind two ewes and two lambs and the hay and dead stock. According to evidence given at the trial of the action it was his normal practice during lambing to take the ewes back to his farm, and the removal of the bulk of the flock on March 28 was only an example of that well-established practice and was not either intended to be, or in contemplation of, a delivery up of possession in accordance with the notice. The two ewes left behind were removed by the defendant to his farm some three weeks later. In the meantime the plaintiff, without seeking the permission of the defendant, put a pony and four heifers on the land some time in April, erected some simple jumps for his children to use when exercising the pony, and made some survey of the land to see what its condition was, but took no further action with regard to the land. However, on May 16, 1960, he followed up his original claim under section 58 by serving upon the defendant a notice under section 70 of the Act of 1948 requiring arbitration to determine the amount of the claim for compensation, which disclosed to the defendant for the first time that he was claiming some £700, a figure which the defendant and his adviser, Major Chalk, thought excessive.

Shortly after the receipt of that notice the defendant consulted new solicitors. In the meantime, Major Chalk's firm (in his absence) had written to the plaintiff's agents on May 18, 1960, with reference to the notice under section 70 protesting at the amount of the claim and stating that from March to May if the land was left dormant was just the time when a difference in appearance could be made. Two days later the plaintiff struck a bargain with another farmer whereby the latter was to take the hay and aftermath of one of the fields, but on May 23 he was informed by the defendant's new solicitors that they had advised the defendant that the notice to quit was not valid, and requiring the plaintiff to remove from the land the stock he had put upon it. On the same day the defendant brought back on the land a substantial quantity of sheep and thereafter asserted his full right to the occupation of the land.

On August 26, 1960, the plaintiff issued a writ claiming possession of the land, damages, mesne profits and an injunction to restrain the defendant, his servants or agents, from trespassing on the land. He claimed that by virtue of the tenancy agreement of July 20, 1948, the lands were let by the plaintiff to Edith Elsie Hall, who thereby became the tenant with whom the contract of tenancy was made within the meaning of section 24 (2) (*g*) of the Agricultural Holdings Act, 1948, for a term commencing on March 25, 1948, from year to year; that on April 12, 1960, Edith Elsie Hall assigned the benefit of the tenancy to the defendant whereafter the defendant paid the rent due by virtue of the agreement; that Edith Elsie Hall having died on February 16, 1959, the plaintiff on March 19, 1959, within three months of her death, served notice to quit the holding upon the defendant; that the notice had expired on March 24, 1960, and that, notwithstanding the expiration of the notice, the defendant had wrongfully entered thereafter on the plaintiff's land and claimed to retain possession thereof, whereby he had trespassed upon the plaintiff's land.

By his defence the defendant denied the validity of the notice to quit and claimed that he was lawfully in possession of the land as tenant (a) by virtue of his pre-1948 tenancy, and (b) by virtue of the assignment to him. He contended that the notice to quit was served after the assignment of the term to the defendant and that, on the date of her death, Edith Elsie Hall was no longer the tenant, alternatively that by virtue of the agreement of July 20, 1948, between the plaintiff and the deceased Edith Elsie Hall, and the agreement in writing between the plaintiff and the defendant in April, 1950, and of the assignment of April 12, 1950, he (the defendant) became and still was the tenant with whom the contract of tenancy was made within the meaning of section 24 (2) (*g*) of the Act of 1948; that he had at all material times retained possession of the land and had never either left or re-entered the same or trespassed thereon as alleged or at all. By his reply the plaintiff contended, inter alia, that the defendant was estopped from alleging that he was the tenant by virtue of any tenancy prior to 1948. (The allegation of any subsisting pre-1948 direct tenancy was dropped before the trial.) Alternatively, that any tenancy prior to 1948 was surrendered by operation of law; further, that the defendant quitted the land in March, 1960, alternatively that he removed his stock from the land and instructed a valuer to act for him to submit a claim upon quitting the holding which was notified to the plaintiff, thereafter the plaintiff entered into possession of the holding.

Adrian Head for the plaintiff. (1) The notice under section 24 (2) (*g*) of the Act of 1948 was served on the necessary parties including the defendant. If the facts are that the defendant's mother died within three months of the service of the notice, section 24 (2) (*g*) applies. The only proper interpretation of the subsection is that, where a contract is made with a tenant who dies, a notice may be served on the person who is the tenant at the time of the death whether that person was the original tenant or an assignee: see sections 24 and 94 and Jackson and Muir Watt on Agricultural Holdings, 11th ed. (1959), p. 384. "Tenant" means "the holder of land under a contract of tenancy, and "includes . . . assigns . . . or other persons deriving title from "a tenant": section 94. A person having a legal estate in land includes executors, administrators and assigns, and that classification of persons includes assignees who are assignees at law of the estate of the tenant and also assignees by operation of law. If the tenant is a "holder," it means a present or past holder. There is such a thing as a past tenant, as a tenant can be a "person deriving title from a tenant." On the plain construction of those words "tenant" does not cease to be referable to a tenant who has occupied but no longer occupies the land in question. That would follow from a consideration of the ordinary law of landlord and tenant, which is only ousted in so far as the statute says so. Under the ordinary law, if A, a tenant, assigns to B, A remains liable on the covenants if B fails to fulfil them.

In section 24 (2) (*g*) the ground for giving notice to quit is the death of the particular tenant with whom the contract was made. Section 24 (1) contemplates two classes of tenant, (1) the tenant to whom notice to quit is to be given, and (2) the tenant with whom the contract was made but who has since died. If a notice can be served on a tenant because the tenant with whom the contract was made has died, it must follow that the tenant on whom the notice can be served must be different from the tenant with whom the contract was made. Here the notice was served on the defendant who claims to be the tenant by virtue of an assignment. He derives his title from his mother, who was the tenant with whom the contract was made.

The effect of the Act is to grant a life tenancy to a tenant, so that he shall not be disturbed during his lifetime. An assignee who takes from such a tenant knows that his tenancy is bounded by the life of the original tenant. In effect he takes an estate pur autre vie, an estate which is enshrined in the law, and which was, in effect, preserved by the Law of Property Act, 1925: see section 149. If that is so, both parties know what the life of the estate is. If the defendant is right, an estate could be granted to a person who could assign it to somebody else and it would either fall in at the death of that assignee or, if he reassigned it, it need never fall in at all.

As to the meaning of section 24 (2) (*g*), see *Woodward* v. *Earl of Dudley*.[2] That case is in the plaintiff's favour on the construction of the subsection although the decision no longer applies as the law has been changed in some respects by the Agriculture (Miscellaneous Provisions) Act, 1954. See also Jackson and Muir Watt on Agricultural Holdings, 11th ed. (1959), p. 315. It is difficult to resist the conclusion that when the draftsman was drafting section 24 of the Act of 1948 he had not in mind section 149 of the Law of Property Act, 1925. *Costagliola* v. *Bunting* [3] is directly on this point.

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[2] [1954] Ch. 283; [1954] 1 W.L.R. 476; [1954] 1 All E.R. 559.

(2) The defendant took as an assignee and asked if the assignment was permissible. There was consent to an assignment and there was an assignment, and the defendant as assignee is estopped from asserting that he occupies the premises in any other capacity: *Rodenhurst Estates Ltd.* v. *W. H. Barnes Ltd.*[4]

[WIDGERY J. There must have been more facts found in that case. Its value is limited by the brevity of the report.]

That is so. There is no way in which the defendant can assert his tenancy without asserting the agreement made between the plaintiff and the defendant's mother, because if he claims to be the assignee he is claiming by virtue of the estate conferred on his mother. It has always been possible for an assignee to make some particular form of contract with the landlord, but that does not make him the landlord's tenant by virtue of an agreement. He is a tenant by virtue of the estate, granted by the landlord to somebody else, which has been assigned to him. The defendant is in a difficult position if he is going to suggest that any discussion he had with the plaintiff had any contractual effect. The relationship between the plaintiff and the defendant is merely that of landlord and assignee. If that is wrong, the plaintiff will call evidence to show that the defendant's actions on the termination of the tenancy were such as to prevent him from asserting its continuance. There is no doubt that the removal of the sheep from the premises by the defendant was an overt act signifying a surrender of the tenancy.

George Dobry and *Michael Rich* for the defendant. (1) The first part of section 94 (1) of the Act of 1948 defines " tenant " as " the holder of land under a contract of tenancy." It goes on to say " and includes the executors, administrators, assigns . . . " or other person deriving title from a tenant." That definition, taken together with the words of section 24 (2) (*g*), clearly shows that the context requires that certain classes of persons must be excluded. The class of tenants in respect of which section 24 (2) (*g*) operates is limited by the context, but the definition in section 94 (1) need not be rejected as a whole. The words of Gorman J. in *Costagliola* v. *Bunting* [5] that the second limb of section 24 (2) (*g*) has a limiting effect are adopted.

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[3] [1958] 1 W.L.R. 580; [1958] 1 All E.R. 846.

[4] [1936] W.N. 154, C.A.

[WIDGERY J. You have to say that the defendant was the holder of land and the tenant under a contract of tenancy. Do you do that by invoking the definition section?]

Yes. Section 24 (2) (*g*) only comes into operation after the death of a direct tenant who was holding as tenant at the date of his death. A notice can be served three months thereafter, but the subsection does not operate at all after an assignment.

[WIDGERY J. If I am against you, are you going to say that the plaintiff's argument produces an absurd result?]

Yes. If a landlord wishes to avoid giving a lease in perpetuity all he has to do is to include an absolute covenant against assignment. The Act of 1948 is primarily intended for the protection of tenants. If the plaintiff's argument is correct an assignee will be in complete uncertainty as to how long he is entitled to stay. That is a most unsatisfactory position, e.g., the assignor may die 30 years after the assignment. On the question of reasonableness of construction, I must recognise that there are always arguments of equal cogency on either side.

(2) The defendant became a direct tenant of the plaintiff by virtue of the tripartite agreement made in 1950. The deed of assignment was a completely different document from a licence to assign which an assignor grants to an assignee. It is submitted that that document established (1) privity of contract between the plaintiff and the defendant; (2) a novation as distinct from a transfer; (3) an assignment by operation of law and a regrant. The plaintiff thereafter looked to the defendant to perform all the covenants of the lease before and after assignment and for his own part undertook not to sue the defendant's mother for any breach. If all the obligations of a tenancy are taken over by an assignee, that produces a new contract: *J. Lyons & Co.* v. *Knowles.* [6]

[WIDGERY J. You must show that it is a contract of tenancy. There is authority that an assignee is in a position of surety for the original tenant.]

It may be a contract of indemnity, but it is submitted that here there was a completely new contract as the basic terms of the original contract had been changed. In those circumstances a novation arises. It is possible for the landlord to accept an assignee as his tenant: see *per* Bayley J. in *Thomas* v. *Cook.*[7] [Reference was made to *Purchase Brewery Co.* v. *Lichfield*[8] and *Foster* v. *Robinson.*[9]]

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[5] [1958] 1 W.L.R. 580, 582.

[6] [1943] K.B. 366; 59 T.L.R. 229; [1943] 1 All E.R. 477, C.A.

On the question of surrender and estoppel, the plaintiff must show a representation to give up possession. The intention of the parties does not matter: *Read* v. *J. Lyons & Co. Ltd.*[10] The action of the defendant in removing his sheep was not an overt act signifying the surrender of the lease, as he removed them every year. Nor were the steps he took under section 58. There was here no act of notoriety such as is normally required to prove a surrender.

Head, in reply on the questions of surrender and estoppel, referred to *Harnam Singh* v. *Jamal Pirbhai*,[11] *Lyle and Mellor* v. *Lewis (A.) & Co. (Westminster) Ltd.*[12] and *Foster* v. *Robinson.*[13]

WIDGERY J. This is a case in which the plaintiff sues the defendant for an injunction and damages in respect of an alleged trespass by the defendant on the plaintiff's land which is known as Tanyard Land, in the parish of Frittenden, in the county of Kent. Although the action takes that form it is, in fact, a landlord and tenant dispute of a familiar kind, the substance of the matter being that the plaintiff owns the land in question and the defendant is, or was, the tenant of that land. The plaintiff alleges that the defendant's tenancy has been determined. The defendant denies this and has proceeded to exercise certain rights of possession over the land. In those circumstances the plaintiff seeks to adjust the issue by claiming the injunction and damages to which I have referred. [His Lordship stated the facts, read section 24 (1) and (2) (*g*) of the Agricultural Holdings Act, 1948, and continued:] The issues which arise in this case are these: the plaintiff says the defendant's tenancy has been determined. The defendant denies it. The plaintiff bases his submissions really on two limbs. He says, first, that the notice to quit is itself a valid notice, effectively determining the tenancy on March 25, 1960; alternatively, he says that the defendant has determined this tenancy by a surrender; or, possibly, in the second alternative, is estopped from denying that he has determined his tenancy. It will be convenient if I take those two points in that order.

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[7] (1818) 2 B. & Ald. 119, 121.

[8] [1915] 1 K.B. 184, D.C.

[9] [1951] 1 K.B. 149; 66 T.L.R. (Pt. 2) 120; [1950] 2 All E.R. 342, C.A.

[10] [1947] A.C. 156; 62 T.L.R. 646; [1946] 2 All E.R. 471, H.L.

[11] [1951] A.C. 688, P.C.

[12] [1956] 1 W.L.R. 29; [1956] 1 All E.R. 247, C.A.

[13] [1951] 1 K.B. 149.

Returning to section 24 (2), paragraph (*g*), of the Act of 1948, the first question which I must decide in considering whether this paragraph gives the plaintiff the relief which he claims is: what, on the facts of this case, is the contract of tenancy to which paragraph (*g*) refers? It is urged upon me by Mr. Dobry for the defendant that on the facts a new contract of tenancy came into existence in 1950 when the defendant became tenant of this land. He says, therefore, that, there being a new contract of tenancy made in 1950, the tenant with whom that contract was made is the defendant, and not his mother, and that consequently there is no room for the application of paragraph (*g*).

Mr. Dobry has fought this point most tenaciously, but I am bound to say that it seems to me to be virtually unarguable. The assignment, by its very terms, states that what was being passed to the defendant was the existing estate of his mother upon the terms and conditions which she had contracted to observe in the original tenancy agreement, and I cannot accept the argument that the accompanying licence is in any sense a novation, creating a new tenancy agreement. In my judgment these two documents are entirely consistent with the defendant becoming a tenant under the old tenancy and being regulated by the terms of the old tenancy, and I regard the additional covenant against assigning or underletting, which the defendant entered into in the licence, as being a purely collateral personal bargain between himself and the plaintiff. I therefore find against the defendant on that argument, and hold that the contract of tenancy in this case, within the context of paragraph (*g*), was the original contract of letting with Mrs. Hall, and that therefore means that Mrs. Hall is the individual with whom that contract was made.

Mr. Dobry then contends that even on that view paragraph (*g*) has no application here, and his argument, in substance and however it is put, really amounts to this: that on the proper construction of paragraph (*g*) the landlord is only entitled to take advantage of the facility to give notice to quit an agricultural property if the tenant who has just died was not only the tenant with whom the contract of tenancy was made but was also at the moment of death the actual tenant of the land, in the sense of being the person in whom the tenant's interest was actually vested. He says, in effect, that paragraph (*g*) on its proper construction can only apply when the person whose death is said to make the giving of the notice to quit possible is both the original tenant and still the tenant at the date of death. Accordingly, he says that once the tenancy has been assigned, as it has been assigned in this case, paragraph (*g*) can have no further effect.

I have been referred to two authorities on the construction of paragraph (*g*) but neither of them is directly helpful on this point, and, indeed, it seems to arise for decision for the first time. Mr. Dobry has referred me to section 94 of the Act, which contains a definition of "tenant" in the following terms: "'tenant' "means the holder of land under a contract of tenancy, and "includes the executors, administrators, assigns, committee of "the estate, or trustee in bankruptcy of a tenant, or other person "deriving title from a tenant." He submits that in the light of that definition paragraph (*g*) should be read as follows, namely: "The holder of land, being the holder with whom the contract of "tenancy was made, had died within three months before the "date of the giving of the notice to quit," and he relies on the fact that by incorporating the word "holder" in that way he incorporates a word which implies the actual holding of the estate and is inconsistent with a reference to someone who formerly held that estate.

In my judgment, looking at the words in paragraph (*g*) without assistance from authority, I think that they are clear, and I think that they mean what, in my view, they say, namely, that the landlord may take this opportunity of serving notice to quit if the individual who was the tenant with whom the contract of tenancy was made has died within the preceding three months. I do not think that the words are ambiguous and that is the meaning which I would give them, and I am unable to accept Mr. Dobry's argument based upon section 94, because I think that it is implicit in that argument that a reference to "tenant" in section 24 should not, unless the context otherwise requires, include a former tenant.

That, in my judgment, is really the basis of his argument, and that it is unsound is apparent to me both from section 24 itself and from section 94, because each of those sections in its own way makes it perfectly clear that the draftsman is using the word "tenant" to include not merely the present holder of the land but also a former holder who was formerly the tenant. Thus, in section 94, there is reference to the executors and administrators of a tenant. That, in itself, as I see it, shows that the word "tenant" is being used to describe a past holder, not a present one, and, as Mr. Head has pointed out, the same considerations apply to section 24 itself. Under section 24 (1) notice to quit is given to the tenant of the land, in certain circumstances, where paragraph (*g*) of subsection (2) is applied, when there has been the death of a former holder. Thus the draftsman still, in paragraph (*g*), uses the words "the tenant" to describe that person who by hypothesis is already deceased.

It seems to me, therefore, that it is quite impossible to say that whenever the Act refers to a person as tenant it is necessarily speaking of someone who is a present tenant and necessarily not speaking of someone who was a former tenant, and, in my judgment, the correct interpretation of paragraph (*g*) is that the person referred to as "tenant" is someone who is not now the tenant, because he or she is dead, but someone who was the tenant on a former occasion. That being the case, I see no reason at all to confine the words so as to require that the tenant referred to should still have been the holder of the estate at the date of his or her death.

Consequently, in my judgment, this notice to quit is valid and the tenancy duly determined in accordance with it on March 25, 1960.

That is sufficient, of course, to dispose of this matter, but in case the defendant is minded to have the question considered in another court, I think it would be helpful if I at least made some observations and finding of fact with regard to the other issues which have been argued. On these other issues Mr. Head, on behalf of the plaintiff, has first of all submitted that where a notice to quit is given by a landlord and the tenant's actions, or representations, are indicative of the fact that he is accepting that notice as valid, and will proceed to quit in accordance with it, there may then be set up an estoppel which will prevent the tenant from subsequently denying the validity of the notice. That such an estoppel could, or may, arise is apparent from authority which has been cited to me, and I refer in particular to *Harnham Singh* v. *Jamal Pirbhai.*[1] It is equally apparent, in my judgment, that before such an estoppel can be set up there must be an unequivocal representation made by the defendant to the effect that he is treating the notice as valid and proposes to go.

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[1] [1951] A.C. 688, P.C.

[His Lordship then referred to the correspondence between the plaintiff and the defendant's solicitors up to the time that the notice to quit expired on March 25, 1960, and said that, in the circumstances of this case, the letter of February 25, 1960, from Major Chalk was not sufficient to create an estoppel against the defendant. Moreover, the removal by the defendant of most of his stock from the land on March 28, 1960, was not an unequivocal action amounting to a representation by the defendant that he was going to go as it was consistent with his past practice in the spring for many years, and was just as consistent with his intention to retain the tenancy as with his intention to give it up. Further, the letter from Major Chalk's firm of May 18, 1960, was quite insufficient to found any representation that the tenancy had come to an end. He could therefore find no ground for saying that the defendant was estopped from denying the validity of the notice to quit, and if the matter turned on that point he would decide the case in favour of the defendant.

[His Lordship then referred to the submission made on behalf of the plaintiff that there had been actual surrender by operation of law, and said that in his judgment the removal of the bulk of the sheep on March 28, 1960, was not a giving up of possession by the defendant. It was a perfectly normal move in good husbandry, and there was no reason to suppose that the sheep were taken away with a view to their being kept permanently on the defendant's farm. On the contrary, all the facts were consistent with their removal having been the normal temporary spring removal which the defendant usually carried out. Although the defendant had carried out no normal farming operations between March 28 and May 23 a tenant did not give up possession of agricultural land merely by not using it. He had left behind two ewes and lambs and a certain amount of dead stock, and on one occasion one of his men was sent back in the latter part of April, 1960, to do some hedging. Even if he was doing that work with a view to reducing the claim against him under section 58 of the Act he had no right to do it after his tenancy had come to an end. That was another factor, however small, pointing to the fact that the defendant had never abandoned possession, if and so far as it was a matter of intention. He found that the defendant was disappointed with the advice he was receiving up to March 25 1960, as it was suggesting to him that he would have to go and that the notice was valid but, nevertheless, in his Lordship's judgment, the defendant never gave up hope. He was prepared to remain hoping that something would turn up, and if and so far as his intention was a matter of importance, he found that the defendant never intended to give up possession and continued to hope that by some means or other the matter would be resolved in his favour. For those reasons he found that there was no surrender of this tenancy and, again, but for his decision on the notice to quit he would, if that were the only matter, have decided the case in favour of the defendant. His Lordship continued:]

In substance he has been kept out of this land for about 12 months, and it is common ground between the parties that the value of this land is about £200 per annum, whether one thinks in terms of the rent at which it would let or of the profit which the owner-occupier might reasonably expect to make. In my judgment, therefore, the matter of damages will be adequately met by my awarding the plaintiff £200. He is also entitled to the injunction for which he prays.

Judgment for the plaintiff with costs.

Solicitors: *Wrinch & Fisher for Murton, Clarke & Murton-Neale, Cranbrook; Field, Roscoe & Co. for Hallett & Co., Ashford, Kent.*

E. M. W.

NEWBERRY v. SIMMONDS.

1961
March 1, 28.

Lord Parker C.J., Winn and Widgery JJ.

Road Traffic—"Motor-vehicle"—"Mechanically propelled vehicle"—Engine removed from motor-car—By appearance ordinary car—Whether "mechanically propelled vehicle" requiring licence—Vehicles (Excise) Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 89), *s.* 15.

Between November 7 and December 3, 1959, the defendant left his Ford motor-car, for which he had no vehicle excise licence, in a public road. On being charged with having kept on a public road a mechanically propelled vehicle for which a licence under the Vehicles (Excise) Act, 1949, was not in force, whereby he became liable to the penalty provided by section 15,[1] he stated to the justices that some time prior to the period in question the engine of the car had been stolen by some person unknown. By appearance, that was, without lifting the bonnet to see if it had an engine, the car was an ordinary motor-car. The justices considered that the prosecutor had failed to prove that the car had an engine in it and that, if there was no engine in it, it was not a mechanically propelled vehicle which required an excise licence, and they dismissed the information. On appeal:—

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[1] Vehicles (Excise) Act, 1949, s. 15: "(1) If any person uses on a "public road any mechanically pro- "pelled vehicle for which a licence "under this Act is not in force . . . "he shall be liable to . . ." a penalty.

Held, that, prima facie, the phrase "mechanically propelled "vehicle" in the Vehicles (Excise) Act, 1949, had the same meaning as it had in the Road Traffic Act, 1930, and that a motor-car did not cease to be a mechanically propelled vehicle on the mere removal of the engine if the evidence admitted the possibility that the engine might shortly be replaced and the motive power restored. The absence of an engine, therefore, was not conclusive, nor was the evidence of the defendant sufficient to take what was in other respects an ordinary motor-car out of the classification of a mechanically propelled vehicle, so that, on the totality of the evidence, the justices had no alternative but to find the charge proved, and, accordingly, the case must be remitted to them with a direction to convict.

Floyd v. *Bush* [1953] 1 W.L.R. 242; [1953] 1 All E.R. 265, D.C. and *Lawrence* v. *Howlett* [1952] 1 T.L.R. 1476; [1952] 2 All E.R. 74; 116 J.P. 391, D.C. considered.

Quaere. Whether, once a vehicle has been shown to be by appearance a motor-car, the onus of proof might not shift to the owner to establish that at the material time it was no longer a mechanically propelled vehicle.

CASE STATED by London, Kensington, justices.

On June 28, 1960, an information was preferred by Edwin Walter Newberry (a duly authorised officer acting on behalf of the London County Council) against the defendant, Charles Simmonds, alleging that on November 7, 1959, at Courtfield Gardens, Kensington, he did keep on a public road a mechanically propelled vehicle, registration mark BBD 423, for which a licence under the Vehicles (Excise) Act, 1949, was not in force, not being a vehicle exempted from duty under section 7 of the Act, whereby he became liable to the excise penalty in that case made and provided by section 15.

The justices found the following facts: Between November 7, 1959, and December 3, 1959, the defendant kept a Ford motor-car, number BBD 423, in the road in Courtfield Gardens, Kensington, S.W.5. During that period the car bore an expired road fund licence. On February 12, 1960, a police officer saw the defendant about the Ford car. The defendant admitted he was the owner thereof and had left it in Courtfield Gardens between November 7, 1959, and December 3, 1959. When asked for its vehicle excise licence he replied he had no such licence. The defendant stated to the justices that at some time prior to the aforesaid period the engine from the Ford car had been stolen by some person unknown. When fitted with an engine the Ford car was a mechanically propelled vehicle. By appearance (that was, without lifting the bonnet to see if it had an engine) the Ford car was an ordinary motor-car.

It was contended by the defendant that because the Ford car had no engine during the period of time in question it was not a mechanically propelled vehicle within the Vehicles (Excise) Act, 1949, and that accordingly such a car required no excise licence and he was not guilty, therefore, of the offence.

It was contended on behalf of the prosecutor that the words "mechanically propelled vehicle" were words of classification and not words of definition so that the Ford car was within the ambit of the Vehicles (Excise) Act, 1949, and that since the defendant had no licence under the Act he was guilty of the offence.

The justices were of the opinion (i) that the prosecutor had failed to prove that the car had an engine in it during the period of time in question; and (ii) that if there was no engine in the car it was not a mechanically propelled vehicle which required an excise licence, and, accordingly, they dismissed the information.

The prosecutor appealed, the question for the opinion of the High Court being whether, upon the above statement of facts, the justices came to a correct determination and decision in law.

Paul Wrightson for the prosecutor. The justices were wrong in holding that the Ford car was not a mechanically propelled vehicle requiring an excise licence. The expression "mechanically "propelled vehicle" is not defined in the Vehicles (Excise) Act, 1949, but it is submitted that it must have the same meaning in that Act as it has in the Road Traffic Acts: see section 1 of the Road Traffic Act, 1930, which applies Part I of that Act to "all "mechanically propelled vehicles intended or adapted for use on "roads . . ." Since the Roads Act, 1920, the first Act imposing the present system of licensing for "mechanically propelled "vehicles" (see section 1) and the predecessor of the Act of 1949, there have been two parallel sets of legislation: the Road Traffic Acts, in each of which mechanically propelled vehicle has had the same meaning, and the Acts applying to licensing of vehicles, which repeat the words of the Act of 1920. Both use the expression "mechanically propelled vehicle" and as a matter of common sense and logic it must bear the same meaning in both. The decisions under the Road Traffic Acts, therefore, are relevant.

A vehicle is a "mechanically propelled vehicle" as a matter of classification and not of definition: see *Lawrence* v. *Howlett.*[2] It matters not, therefore, whether it is capable of moving. If a wheel is off, or the battery is flat, it does not mean that it is not a mechanically propelled vehicle, and if a person controls such a vehicle, e.g., while it is going downhill, he may be guilty of an offence under the Road Traffic Acts: compare *Elliott* v. *Grey*[3] and *Floyd* v. *Bush.*[4] [Reference was also made to *Wallace* v. *Major.*[5]] The same principle applies here, and the mere fact that this car did not have an engine does not mean that it was not a mechanically propelled vehicle. If that were not so, a car would cease to be a mechanically propelled vehicle every time the engine was removed for repairs. Once registered as a mechanically propelled vehicle, a vehicle does not cease to be such until it is broken up in the car breaker's yard, and the log book has been returned to the licensing authority and the number plates destroyed. But that stage is not reached, and a vehicle remains a "mechanically propelled vehicle," until it is incapable of going at all, that is, until it cannot be towed, or pushed or rolled downhill, but is a complete wreck and no longer in any sense a motor-vehicle.

The defendant did not appear and was not represented.

Cur. adv. vult.

March 28. WIDGERY J. read the following judgment of the court: This is an appeal by way of case stated by justices for the Park Petty Sessional Division of the County of London arising out of the hearing of an information laid by the appellant and alleging that on November 7, 1959, at Courtfield Gardens, Kensington, the defendant did keep on a public road a mechanically propelled vehicle bearing registration mark BBD 423 for which a licence under the Vehicles (Excise) Act, 1949, as amended, was not in force, whereby the defendant became liable to the excise penalty provided by section 15 of that Act.

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[2] [1952] 1 T.L.R. 1476; [1952] 2 All E.R. 74; 116 J.P. 391, D.C.

[3] [1960] 1 Q.B. 367; [1959] 3 W.L.R. 956; [1959] 3 All E.R. 733, D.C.

[4] [1953] 1 W.L.R. 242; [1953] 1 All E.R. 265, D.C.

[5] [1946] K.B. 473; 62 T.L.R. 406; [1946] 2 All E.R. 87, D.C.

The justices heard this information on September 16, 1960, and found the following facts: (a) between November 7, 1959, and December 3, 1959, the defendant kept a Ford motor-car, No. BBD 423, in the road in Courtfield Gardens aforesaid. (b) During the period aforesaid the car bore an expired Road Fund licence. (c) The defendant admitted that he had no current Road Fund licence for the said car. (d) By appearance (that is to say, without lifting the bonnet) the car was an ordinary motor-car.

At the hearing before the justices the defendant stated that at some time prior to November 7, 1959, the engine of the car had been stolen by some person unknown, and he contended that, because the car had no engine at the material time, it was not a mechanically propelled vehicle and that, accordingly, he had not committed the offence charged.

It does not appear that the justices affirmatively accepted the defendant's statement about the theft of the car's engine. They have stated that they were of the opinion that if there was no engine in the car it was not a mechanically propelled vehicle and that the onus was on the prosecutor to prove affirmatively that the car had an engine. The prosecutor having failed to prove this fact the justices dismissed the information.

The Vehicles (Excise) Act, 1949, contains no definition of the expression "mechanically propelled vehicle," but Mr. Wrightson, who appears for the prosecutor, contends that this expression should have the same meaning in the Act of 1949 as it has in the Road Traffic Acts and, in particular, in section 1 of the Road Traffic Act, 1930. Founding himself on authority under the Act of 1930, he submits that the words are words of classification and not of definition so that a vehicle does not cease to be "mechanically propelled" merely because some part of its propelling mechanism has been removed, and he invites us to say that a motor-car remains within the classification of a mechanically propelled vehicle until it finally reaches the breaker's yard and its registration book is surrendered. Accordingly, he contends that the motor-car in this case remained a mechanically propelled vehicle even if its engine had been stolen. We have not had the advantage of hearing argument on the other side.

We accept the submission that, prima facie, the words in question have the same meaning in the Act of 1949 as in the Act of 1930 and have accordingly considered the authorities under the latter Act cited by Mr. Wrightson.

It appears from the judgment of this court in *Floyd* v. *Bush*[1] that a vehicle may still be "mechanically propelled" for this purpose even though mechanical power was not in use at the material time, and in the somewhat unusual case of *Lawrence* v. *Howlett*[2] Devlin J. said[3]: "A motor-car is a mechanically pro-"pelled vehicle. It is designed so that it has only a mechanical "means of propulsion, and, therefore, I should hold that, what-"ever its use might be at any given moment, whether it was in "working order or whether it was being driven on a free wheel or "driven downhill with the engine disengaged, it still was being "used as a mechanically propelled vehicle."

In the last-mentioned case the vehicle was a pedal-cycle with an auxiliary motor from which the cylinder piston and connecting rod had been removed and, although there were indications that the removal of those parts was only temporary, the justices found as a fact that it was in use at the material time only as a pedal-cycle, but we think that it may be necessary to consider hereafter whether different considerations apply to a vehicle which has had its mechanical means of propulsion permanently removed. Such a question may be one of fact and degree in which both the extent to which the power unit and transmission have been removed and the permanence of such removal are matters for consideration. We are, however, satisfied that a motor-car does not cease to be a mechanically propelled vehicle upon the mere removal of the engine if the evidence admits the possibility that the engine may shortly be replaced and the motive power restored.

In the present case, therefore, the fact that the prosecutor had not proved that there was an engine in the car was of no significance because the absence of an engine would not be conclusive. Further, even if the justices accepted the evidence of the defendant, that evidence was not in itself sufficient to take a vehicle which was in other respects an "ordinary motor-car" out of the classification of a mechanically propelled vehicle. On the totality of the evidence in this case, the justices had no alternative but to find the charge proved, and the case will be sent back to them with a direction to convict.

That being, as the court thinks, the position with regard to the point of law raised by the case stated, it is not necessary to decide

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[1] [1953] 1 W.L.R. 242; [1953] 1 All E.R. 265, D.C.

[2] [1952] 1 T.L.R. 1476; [1952] 2 All E.R. 74; 116 J.P. 391, D.C.

[3] [1952] 2 All E.R. 74, 75.

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where in such a state of facts as these justices partially investigated the onus of proof would rest. It may perhaps arise some time for consideration whether, because the owner of a vehicle would normally have peculiarly within his own knowledge all the relevant facts, the onus of proof should be regarded as shifting to him, once his vehicle has been shown to be by appearance a motor-car, to establish that it was at the material time no longer a "mechanically propelled vehicle."

Appeal allowed with costs.

Solicitor: *J. G. Barr.*

J. F. L.

TOWERS & CO. LTD. *v.* GRAY.

1961
March 1, 2.

Lord Parker C.J., Winn and Widgery JJ.

Trade Mark—False trade description—"Possession for sale"—Frozen chickens—Weighing less than marked weight—Stored in cold store under agreement giving cold store company general lien for storage charges due—Available to owners on demand—Whether in owners' possession—"Possession"—Meaning—"Possession for sale or any "purpose of trade"—Whether mutually exclusive—Merchandise Marks Act, 1887 (50 *&* 51 *Vict. c.* 28), *s.* 2, *as amended by Merchandise Marks Act,* 1953 (1 *&* 2 *Eliz.* 2, *c.* 48), *s.* 4.

Bailment—Possession—Possession of bailor—Goods stored subject to lien—Whether bailor in "possession"—Merchandise Marks Act, 1887, *s.* 2.

A farmer supplied to the appellant company a quantity of frozen chickens, each wrapped in a cellophane bag inside which the weight of the chicken was marked. On receipt of the chickens, the appellant company directed them into a cold store belonging to another company under an agreement which provided, inter alia, for storage charges to be paid by the appellant company, and which gave the cold store company a general lien on the goods for all charges due, and the appellant company a right to withdraw the goods on demand during specified hours on the presentation of a voucher and an indent. It came to the knowledge of the appellant company that the weights marked on the chickens were inaccurate as the farmer's scales were faulty, and they instructed their manager to weigh them in bulk before sending them off to their customers, but no arrangements were made for individual reweighing. On June 10, 1960, an inspector of weights and measures check weighed some of the chickens, and by agreement the weighing took place at the cold store, the chickens being returned to the refrigerators after being weighed. A number of chickens were found to weigh less than the marked weights and the appellant company was charged with having in their possession for the purpose of trade 39 chickens to which a false trade description applied contrary to section 2 (2) of the Merchandise Marks Act, 1887,[1] as amended by section 4 of the Merchandise Marks Act, 1953. Justices were of opinion that, although the cold storage company were in physical possession of the chickens, the appellant company was in constructive possession of them, and they convicted and fined the appellant company. On appeal by way of case stated:—

Held, (1) that "possession" must be given the popular and common-sense meaning in the particular context in which it was used, and that, as this was a penal statute dealing with sellers of goods, "possession" must be looked at both from the point of view of the criminal law and the commercial community in which it would cover a case such as the present where the goods were held by a bailee to the order of the seller on terms on which he could recover them at once on demand (post, pp. 361, 362, 364, 365).

Dictum of Earl Jowitt in *United States of America and Republic of France* v. *Dollfus Mieg et Cie. S.A.* [1952] A.C. 582, 605; [1952] 1 T.L.R. 541; [1952] 1 All E.R. 572, H.L.; *City Fur Manufacturing Co. Ltd.* v. *Fureenbond (Brokers) London Ltd.* [1937] 1 All E.R. 799, and dictum of Cockburn C.J. in *Reg.* v. *Sleep* (1861) 8 Cox C.C. 472, 480, C.C.R. applied.

(2) That it could not be said that the information was improperly laid on the basis that it charged the appellant company with having the goods in their possession for the purpose of trade, whereas they were in the company's possession for sale, as the words "has in his possession for, sale, or any purposes of trade" in section 2 (2) of the Act were not mutually exclusive (post, p. 366).

(3) That the appellant company was not entitled to rely on the defence that it had acted innocently provided by section 2 (2), and, accordingly, the appeal would be dismissed (post, p. 366).

Slatcher v. *George Mence Smith Ltd.* [1951] 2 K.B. 631; [1951] 2 T.L.R. 272; [1951] 2 All E.R. 388, D.C. applied.

CASE STATED by Leicester justices.

On July 6, 1960, an information was preferred by the respondent, William Gray, an inspector of weights and measures, against the appellant company, Towers & Co. Ltd., that the company on June 10, 1960, at its branch depôt at East Street, Leicester, did have in its possession for the purpose of trade certain goods, namely, 39 pre-packed frozen chickens to which a false trade description was then applied, namely, each of the wrappings within which was a frozen chicken was marked with the net weight of the chickens within the wrapper, whereas in fact the actual weights of the chickens were in every case less than the weight marked on each wrapper, contrary to section 2 of the Merchandise Marks Act, 1887, as amended by section 4 of the Merchandise Marks Act, 1953.

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[1] Merchandise Marks Act, 1887, s. 2 (2) (as amended): "Every person who sells, or exposes for, or has "in his possession for, sale, or any "purpose of trade or manufacture, "any goods or things to which any "forged trade mark or false trade "description is applied, . . . shall, "unless he proves . . . (c) that . . . "he had acted innocently; be guilty "of an offence against this Act."

The justices heard the information on October 4, 1960, and found the following facts. The appellant company leased premises for the purpose of its business as wholesale butchers from the Leicester Pure Ice and Cold Storage Co. The leased premises were adjacent to but separate from premises used as a public cold store or refrigeration plant operated by the cold storage company, the leased premises and the cold store being part of the same property. The conditions under which goods were accepted by the cold storage company for deposit in the cold store were printed on the back of its invoices and receipts. The conditions relevant to this report were as follows:

"1. All goods stored are received at owner's risk . . .

"2. Goods are only received subject to a general lien for all "charges accrued or accruing against the storer and/or owner of "the goods or for any other monies due from the storer and/or "owner of goods, and if such lien is not satisfied after seven "days' notice in that behalf has been given to the storer and/or "owner . . . , the goods or any part of them may be sold to "defray the lien and all expenses incurred. . . .

"8. Production of this voucher will be deemed sufficient "evidence of ownership to authorise delivery of goods to the "bearer thereof."

Certain hours of the day were fixed for the deposit and removal of goods from the store.

The appellant company from time to time in the course of its business used the cold store for the purpose of depositing therein perishable goods bought and sold in the course of its business but leased no specific space therein. On May 26, 1960, a consignment of frozen chickens was received into the cold store from an independent carrier for the appellant company. The consignment consisted of 60 cartons, each of which contained eight chickens, each being packed in a tray and wrapped in cellophane. Receipts signed by employees of the cold storage company were given to the carrier and the appellant company. (On the back of each receipt were the conditions set out above.) The chickens were consigned by the head office of the appellant company to its Leicester depôt and receipt thereof was duly signed for by the company's depôt manager on May 26, 1960. Thereafter the chickens were immediately placed in the cold store and signed for. The producer who had supplied the appellant company with the chickens had marked the net weight of each chicken on its container. His scales were inaccurate. In order to take away goods from the cold store an indent system was used whereby the owner of goods gave a chit to the cold storage company specifying the goods to be collected. The cold storage company kept the chit and gave the owner a delivery note onto which the contents of the chit had been copied. On May 27, 1960, the appellant company notified its Leicester manager of reported shortages of weight of the chickens and instructed him to weigh all the deliveries rather than work on the marked weights, to keep a note of any shortages, and to put forward a report so that the appellant company could claim on the supplier. The Leicester manager gave instructions that each carton of chickens or any smaller quantity ordered be weighed in bulk before sale and that customers be warned to weigh individually and mark the correct weight on each container before retail sale. The appellant company's London manager gave instructions for random check weighing of chickens but at no stage in the handling of the poultry by the appellant company was provision made for each chicken to be weighed individually before sale. The appellant company distributed about 2,000 cases of frozen poultry each week.

On June 10, 1960, an inspector of weights and measures visited the premises of the appellant company at Leicester and asked to check weigh frozen chickens. The manager made arrangements with the cold storage company for the chickens to be produced to the inspector for check weighing. The arrangements were made orally and no indents were made out. The inspector weighed six cartons and of 48 weighed 39 were of less weight than that marked on them, the others being correct or overweight. The weighing took place in the ante-room to the cold store, which was part of the premises of the cold storage company. From time to time the chickens were removed from the deep freeze. Until returned after the weighing, an employee of the appellant company was present and no employee of the cold storage company was present all the time, though one was present at intervals.

It was contended on behalf of the appellant company (a) that there was no evidence that on the material date the appellant company had the chickens in their possession at their branch depôt or at all, and that, accordingly, the submission made on the company's behalf that there was no case to answer ought to have been upheld and the information dismissed; (b) that in any event the evidence proved that on the material date the chickens were not in the possession of the appellant company but in the possession of the cold storage company under a contract of bailment which gave the cold storage company not only actual custody and control but also legal possession as well as a possessory lien; (c) that even if the chickens were in the possession of the appellant company they were not so for the purpose of trade because the appellant company did not intend to sell them as and where they were, but only after they had removed them from the cold store, weighed them by the carton and delivered them with an invoice showing the true weight of the chickens in bulk and with an oral caution that they should be weighed individually and the labels altered as necessary before retail sale; (d) that the appellant company had acted innocently within the meaning of section 2 (2) (*c*) of the Merchandise Marks Act, 1887 (as amended).

It was contended on behalf of the respondent that on the facts, even if the chickens were bailed to the cold storage company, nevertheless the appellant company had the right to their possession (which was, indeed, exercised when the inspector asked the company's manager if he could weigh his chickens). It was further contended that on the facts the appellant company could not rely upon section 2 (2) (*b*) of the Act.

The justices were of opinion, inter alia, that the chickens were immediately available on demand made by the appellant company to fulfil orders given by its retail customers and that the company used the cold store not merely as a place in which to preserve the goods but as a warehouse in which to store them; and that, if the chickens were not to be regarded as actually in the possession of the company, they were in its constructive possession for the purpose of its trade. If wrong, they were of opinion that at the time of weighing the chickens were in the actual possession of the appellant company for the purpose of trade. They were further of opinion that the defence under section 2 (2) (*b*) that the appellant company had acted innocently was not satisfied. They convicted and fined the appellant company.

That company appealed by way of case stated.

Joseph Dean for the appellant company. At the material time the chickens were not in the possession of the appellants for any purpose whatsoever. They were in the possession of the cold storage company, the bailees, under a contract of bailment which gave the bailees a lien on the goods in respect of their charges. The chickens were never taken from the cold storage company's premises, but merely taken out of cold store for the express purpose of being weighed by the inspector and at his request. They were returned thereafter to the cold store. There was here a clear contract of bailment giving the storage company control over the goods and under which the goods could only be taken out of the cold store at certain hours and on the presentation of an indent. That procedure was not followed on this occasion, which further shows that the goods were not taken out of the bailees' possession. The fact that under the contract the goods were available to the appellants on demand does not affect the question of possession. A right to possession is not the same thing as actual possession. Nor could this have been a case of constructive possession, because under the contract the bailees had exclusive possession.

As to the meaning of possession, see Pollock and Wright on Possession (1888), pp. 20 and 129, *Manders* v. *Williams*[2] and *Ancona* v. *Rogers*.[3] [Reference was also made to the Bills of Sale Act, 1854, and *United States of America and Republic of France* v. *Dollfus Mieg et Cie. S.A. and Bank of England*.[4]] In the *Dollfus Mieg* case[4] the House of Lords considered the meaning of possession in connection with the law of sovereign immunity. The remarks of Lord Porter[5] to the effect that a bailor who can at any moment demand the return of the object bailed still has possession were directed to a gratuitous bailment where there is no lien. They cannot apply in the present case because here the bailment was not gratuitous and there was a lien. In any event the authorities to which Lord Porter referred do not appear to support his proposition.

[LORD PARKER C.J. Both Jenkins J.[6] and Earl Jowitt, Lord Atkin and Lord Tucker decided the *Dollfus Mieg* case[7] on the basis of what possession meant in the context of foreign immunity. Lord Porter[8] proceeded on a different basis, namely, that the right to possession and possession are one and the same where there is a gratuitous bailment and no lien.]

In Pollock and Wright on Possession, p. 165, it is clearly stated that the possession of the bailee is absolute. There is nothing to suggest that an immediate right to possession is equivalent to possession. The existence of a lien in itself disproves possession on the part of the bailor. Lien can only exist where the person entitled to the lien has possession of the goods. If he loses possession he loses the lien. It is impossible for both the bailor and the bailee to have possession at the same time, because that would destroy the bailment.

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[2] (1849) 4 Ex. 339.

[3] (1876) 1 Ex.D. 285, C.A.

[4] [1952] A.C. 582; [1952] 1 T.L.R. 541; [1952] 1 All E.R. 572, H.L.

[5] [1952] A.C. 582, 611.

[6] [1949] Ch. 369; [1949] 1 All E.R. 946.

[7] [1952] A.C. 582.

[8] Ibid. 611.

[LORD PARKER C.J. Lord Porter would think it possible.]

[WINN J. Lord Porter did not disapprove *Ancona* v. *Rogers*.[9] He said it did not apply in the *Dollfus Mieg* case.[10]]

It is submitted that lien and possession are inseparable. In the present case it cannot be said that when the chickens were weighed on the floor of the cold store company that company renounced their lien. There are authorities interpreting similar provisions of other statutes which show that possession does not mean the right to possession but full and immediate control and actual possession: see *Cairns* v. *Linton*,[11] *Webb* v. *Baker*[12] and *Oliver* v. *Goodger*.[13]

Assuming for the purposes of this argument that the chickens were in the appellant company's possession at the material time, they were in their possession for the purposes of trade and not for sale. Under the Merchandise Marks Act, 1926, s. 10, "sale" includes wholesale and retail sale. It follows that possession "for the purposes of trade" must be something other than for sale. It cannot be said here that the appellant company had the goods in their possession for sale when they had no intention of selling them without reweighing them. [Reference was made to *Wieland* v. *Butler-Hogan*.[14]]

Finally, if it be held that the chickens were in the appellants' possession for sale, they are entitled to rely on the defence that they acted innocently. As to the meaning of "innocently" for the purposes of this Act, see *Christie, Manson and Woods* v. *Cooper*,[15] although it has been said in later cases that that decision should be confined to its own facts. In the present case the appellant company gave clear instructions that the chickens were to be reweighed before they were sold, and in those circumstances they are entitled to claim that they acted innocently and to rely on the defence given by section 2 (2) of the Act of 1887.

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[9] 1 Ex.D. 285.
[10] [1952] A.C. 582, 611.
[11] (1889) 16 R.(J.) 81.
[12] [1916] 2 K.B. 753, D.C.
[13] [1944] 2 All E.R. 481, D.C.
[14] (1904) 73 L.J.K.B. 513; 20 T.L.R. 419, D.C.
[15] [1900] 2 Q.B. 522; 16 T.L.R. 442, D.C.

Paul Wrightson for the respondent. The present case depends on its facts. The facts found by the justices were those they could reasonably find or infer, namely, that the manager, on May 26, received the chickens and sent them into the cold store next door; the day after he received a notice saying that they were of doubtful weight; that he did not weigh them as he had been instructed to do by his employer. On those facts the appellant company did suspect the genuineness of the article and is not entitled to claim that it acted innocently. *Christie, Manson and Woods* v. *Cooper* [15] has often been quoted but never followed.

As to the meaning of "possession," in circumstances such as the present possession need not necessarily be confined to one person. In all criminal cases possession and control can be in more than one person. The *Dollfus Mieg* case [16] was in fact concerned with sovereign immunity but the argument which was rejected by the House of Lords was precisely similar to that put up in the present case. The appellants' argument can be tested by asking the question: If someone stole the chickens while they were being weighed, would the property be in the appellants or in the cold storage company? If it be right that in a case such as this possession is exclusively in the bailee, if the chickens are found to be underweight proceedings can only be taken against the cold storage company. But they were not in the possession of that company for sale but only for the purposes of refrigeration, which is not the mischief aimed at by the Act. Anyone could remove a refrigerator from his own premises and put it in someone else's premises and escape the consequences under the Act. Reliance is placed on *Reg.* v. *Sleep* [17]: see in particular the further judgment of Cockburn C.J.[18]

So far as the laws of bailment are concerned, a person can only have a lien while he has possession. If he has no lien it implies that at the moment he does not have control and custody of the goods. But a lien can be suspended. The justices have found that the chickens were in the appellants' control because it was the appellants' manager who gave permission for the inspector to weigh them and an employee of the appellants was present all the time they were being weighed. On those facts the chickens were at the material time in the appellants' control.

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[15] [1900] 2 Q.B. 522.

[16] [1952] A.C. 582.

[17] (1861) 8 Cox C.C. 472, C.C.R.

[18] Ibid. 480.

The most that could be said was that they were in the control of both companies.

The judgment of Denning L.J. in *Spurling (J.) Ltd.* v. *Bradshaw* [19] accords with the passage cited from the speech of Lord Porter in the *Dollfus Mieg* case.[20] It is true that Lord Porter was referring to a gratuitous bailment where there was no lien, whereas here there was a lien. Denning L.J.[21] gave an example of a simple bailment with a warehouse where there was a right to demand possession without any lien. As soon as the bailor got the goods from the cold store he was in possession. That is what happened here. Under the contract the appellants have a right to demand possession of the goods and, once that right is asserted and the goods come into the hands of an employee of the appellants, that is sufficient control and custody to constitute possession for the purposes of this Act.

As to the authorities cited by the appellants under other statutes, *Oliver* v. *Goodger* [22] has been very strongly criticised: see *Challand* v. *Bartlett*.[23]

[LORD PARKER C.J. There is nothing in that case which says that the previous court were wrong in giving a narrow meaning to the word possession. It doesn't touch the question whether possession has to be given a meaning which embraces more than physical possession.]

Challand's case [23] suggests that possession for the purposes of this Act does not have to be given a legalistic meaning as distinct from custody. There are cases where a servant has custody and control but not possession, but it is submitted that possession in this Act does not have to be exclusive in one person. Possession must be for sale or for the purposes of trade, therefore it only applies to a company or a shopkeeper who is dealing with the goods for those purposes. In the present case it is the facts which are important. This section is designed to cover circumstances such as this. If it be held otherwise, this could be used as a device to avoid the consequences of the Act.

Assuming that the goods were in the possession of the appellants, they were in their possession for sale. The terms " sale " and " trade " in section 10 of the Act of 1926 are not mutually exclusive. " Sale " bears the same meaning here as it does in the Food and Drugs Act, 1938, namely, sale by retail. Sale for commercial purposes can mean anything from putting soup into tins by the manufacturer to sale to the customer.

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[19] [1956] 1 W.L.R. 461; [1956] 2 All E.R. 121, C.A.

[20] [1952] A.C. 582, 611.

[21] [1956] 1 W.L.R. 461, 465.

[22] [1944] 2 All E.R. 481.

[23] [1953] 1 W.L.R. 1105; [1953] 2 All E.R. 832, D.C.

Joseph Dean in reply. Under the Food and Drugs Act, 1938, "sale" means any kind of sale or contract of sale known to the law.

The respondent's main argument runs counter to the whole law of bailment. The cases he cited in support of his argument are irrelevant.

[Lord Parker C.J. "Possession" has so many different meanings, e.g., if a person is charged as a receiver it is no answer to say "The article is not in my possession; it is in the hands "of a refrigerator company." [Reference was made to *City Fur Manufacturing Co. Ltd.* v. *Fureenbond (Brokers) London Ltd.*[24]]]

It is true that "possession" has been given a different meaning in different contexts. That case was decided under the Sale of Goods Act, 1893, which was a codification of part of the commercial law. This is a criminal statute imposing penalties in connection with the possession and sale of goods and should be strictly construed. Even accepting that "possession" means no more than custody or control; the chickens were still not in the appellants' possession because, although they had the right to complete an indent and to take delivery within certain hours, that right had not been exercised.

Lord Parker C.J. This is an appeal by way of case stated by justices for the City of Leicester, before whom an information was preferred by the respondent against the appellant company that on a certain day in June of last year it "did have in its "possession for the purpose of trade certain goods, namely, pre-"packed frozen chickens to which a false trade description was "then applied, namely, each of the wrappings within which was "a frozen chicken was marked with the net weight, as hereinafter "stated, of the chickens within the wrappers, whereas in fact "the minimum net weight of each of the said chickens was as "hereafter stated contrary to section 2 of the Merchandise Marks "Act, 1887, as amended by section 4 of the Merchandise Marks "Act, 1953." The justices, having dealt with the matter with great care, came to the conclusion that the offence was proved and they fined the appellant company. [His Lordship stated the facts and continued:]

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[24] [1937] 1 All E.R. 799.

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The real point in this case concerns the question whether the chickens while in the refrigerators belonging to the cold storage company were in the possession of the appellant company. The section of the Act in question, section 4 of the Merchandise Marks Act, 1953, inserted a new subsection (2) in the Merchandise Marks Act, 1887, and the relevant words for this purpose are as follows. [His Lordship read the subsection and continued:]

The justices came to the conclusion on the facts of this case that although the chickens were in the physical possession, if I may use that word, of the cold storage company, they were immediately available on demand to the appellant company and that the appellant company were in constructive possession of them for the purposes of its trade. Alternatively, they found, if they were wrong on that, that at the time when the inspector of weights and measures came and weighed the chickens, those chickens were at that point of time in the possession of the appellant company.

The term "possession" is always giving rise to trouble. As Earl Jowitt said in *United States of America and Republic of France* v. *Dollfus Mieg et Cie. S.A. and Bank of England*[1]: "The "person having the right to immediate possession is, however, "frequently referred to in English law as being the 'possessor' "—in truth the English law has never worked out a completely "logical and exhaustive definition of 'possession.'"

For my part I approach this case on the basis that the meaning of "possession" depends upon the context in which it is used. Thus its meaning was dealt with in connection with the Bills of Sale Act, 1854, in *Ancona* v. *Rogers*.[2] Again, in *United States of America and Republic of France* v. *Dollfus Mieg et Cie. S.A. and Bank of England*,[3] to which I have referred, the meaning of "possession" was dealt with in connection with the law of foreign sovereign immunity. In each case it must depend, in my judgment, on the context in which it is used. In some contexts, no doubt, a bailment for reward subject to a lien, and where perhaps some period of notice has to be given before the goods can be removed, could be of such a nature that the only possession that there could be said to be would be possession in the bailee. In other cases it may well be that the nature of the bailment is such that the owner of the goods who has parted with the physical possession of them can truly be said still to be in possession.

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[1] [1952] A.C. 582, 605; [1952] 1 T.L.R. 541; [1952] 1 All E.R. 572, H.L.

[2] (1876) 1 Ex.D. 285, C.A.

[3] [1952] A.C. 582.

In the present case we are dealing with a penal statute dealing with the sellers of goods, and it is to be observed that at any rate possession in the eyes of the commercial community is a word perfectly apt to cover an owner of goods who has those goods warehoused or in the hands of some third person. That appears from the judgment of Branson J. in *City Fur Manufacturing Co. Ltd.* v. *Fureenbond (Brokers) London Ltd.*[4] The facts of the case do not matter. The question was what was meant by "possession" in the Sale of Goods Act, 1893, s. 25. Branson J. in that case refers to the fact that the Factors Act, 1889, had defined "possession" as including possession by another person on behalf of the person whose possession was material. He took the view that in dealing with the Sale of Goods Act, 1893, there was no reason why the same meaning should not be given to the word "possession." He said this[5]: "Possession by an agent, possession by a warehouseman or "mercantile agent, is a perfectly well known form of possession "in the business world, and I can see no reason for confining "the meaning of it to personal possession or actual possession "of the person who has sold the goods." There one has a meaning put on the word "possession" that is common in the commercial world.

Dealing with the criminal aspect of the matter, we have been referred to *Reg.* v. *Sleep.*[6] In that case the prisoner was charged with being in possession of naval stores marked with the broad arrow. He was an ironmonger and brazier of Plymouth, and he delivered on the quay for the captain of a coasting vessel a cask containing copper to be carried from Plymouth to Helston in Cornwall. In order to prove the offence it was necessary to prove, first, that he was in possession of the contents, which were copper bolts, and secondly, that he knew that the copper was marked with the broad arrow. The matter was put in the form of separate questions to the jury. The jury found that he was in possession, but they said they had not sufficient evidence to show that he knew the copper had the broad arrow on it. The case was reserved for the opinion of the court consisting of Cockburn C.J., Pollock C.B., Martin B. and Crompton and Willes JJ. It is to be noted that the Chief Justice began his judgment by saying that he felt bound to say

[4] [1937] 1 All E.R. 799.

[5] Ibid. 802.

[6] (1861) 8 Cox C.C. 472, C.C.R.

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that "there was evidence upon which the jury might well and "reasonably have been called upon to conclude, that the "prisoner knew that the copper bolts were marked with the "broad arrow while in his possession."[7] He then went on to say that the jury, however, had not so found and that on the findings of the jury the prisoner ought not to have been convicted. Pollock C.B. was of the same opinion, but when Martin B. came to deliver judgment he went further; he said[8]: "I think "it [the verdict] was wrong in two particulars. First, I "think the goods were not found in the prisoner's possession "at all. In my judgment the 9 and 10 Will. 3, c. 41, s. 2, "means that the goods must be found in the possession of the "individual on his trial. If he has parted with possession of "them, and they are found, as in this case, in the custody "of the captain of a vessel, I do not think he could be found "guilty upon this enactment." Crompton J. referred to that point which had been taken by Martin B., and he clearly doubted the validity of the point. However, he found it unnecessary to give any opinion as to whether "the possession of "a bailee, like a ship's captain, is the possession of the "prisoner."[9] Willes J. went further and said that in his view "'Possession' means not merely manual possession, but a "property in the thing, though in the custody of another "person."[10] There having been that division of opinion, the Chief Justice added to his judgment by saying[11]: "I certainly "understood that the question whether the possession was "sufficiently proved to be in the prisoner in this case was not "part of the matter submitted or to be adjudicated upon by us. "Lest I should be considered as sharing in the opinion of my "brother Martin, I must say that I hold a diametrically opposite "opinion upon it, and I do so because the point has been already "expressly decided by this court in the case of *Reg.* v. *Sunley*,[12] "which was precisely similar to this in all its circumstances, "and in which it was held by this court that where the stores "were in the possession of a railway company to which they "had been sent by the prisoner for the purpose of being con-"veyed to another place, the possession of the railway company "was the possession of the prisoner, and that he was rightly "convicted under this statute."

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[7] 8 Cox C.C. 472, 478.

[8] Ibid. 479.

[9] Ibid.

[10] Ibid. 480.

[11] Ibid.

[12] (1859) 8 Cox C.C. 179, C.C.R.

I have referred to those two cases because it seems to me that, both in the commercial world and in connection with the criminal law, "possession" has been given a broad interpretation covering something more than actual physical possession, covering cases where, at any rate, a man has the right on demand to recover goods from a bailee.

We have been referred to other cases, in particular to two decisions of this court. In *Webb* v. *Baker*[13] this court had to consider the position of a seller of goods which had been rejected by the buyer and remained on the buyer's premises. The goods in question were rabbits, and the sellers were charged with having in their possession food which was diseased or unsound. The question was whether the sellers on rejection while under an obligation to remove the rabbits were in possession of them, and Viscount Reading C.J., in giving the judgment of the court, said this[14]: "Upon the second point we have come to "the conclusion that there was no evidence to justify the "finding that the rabbits were at the material time in the "possession of the appellant. There is no doubt considerable "force in the contention, based upon a strict and somewhat "narrow construction of the word 'possession,' that there was "sufficient evidence to support the justices' finding; but in our "view the word 'possession' in section 117 [of the Public Health "Act, 1875] should be given a popular, and not a narrow, "construction, and, giving the word that construction, we cannot say that the rabbits were in the possession of the appellant within section 117 during the period that they remained, "under clause 4 of the conditions of the contract, with the "guardians after their rejection, with merely an obligation on "the appellant to remove them within that period." That, clearly is quite a different case, but it is to be observed that Viscount Reading said that the word should be given its popular construction. Its popular construction, no doubt, for the purposes of that case would involve that a man who was miles away and who delivered goods to a purchaser was not in possession of those goods when they were rejected. It is an authority, for what it is worth, for saying that you should give to the word its popular and common-sense meaning in the particular context.

We were also referred to one of the milk cases, *Oliver* v. *Goodger*.[15] The question in that case was whether a farmer was in possession of a churn of milk which, pursuant to arrangements made with the Milk Marketing Board, he had taken off his farm and put at a point beside a road where it was to be collected. It is true that that case was based to some extent on the fact that the farmer no longer had actual possession of the milk; but again it is to be observed that Viscount Caldecote C.J.[16] said that "possession" was not a term of art, and he referred to the statement made by Viscount Reading C.J. in *Webb* v. *Baker*[17] that it should be given a popular construction. In that case the farmer had done all that he had to do under the contract. He had taken the milk off his farm and had, as it were, done all he could to divest himself of possession of the milk. In a popular sense he no longer had possession.

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[13] [1916] 2 K.B. 753, D.C.

[14] Ibid. 758, 759.

[15] [1944] 2 All E.R. 481, D.C.

It seems to me that in the present case in the context in which it appears, both looked at from the point of view of the criminal law and from the point of view of the commercial community, "possession" in its popular sense would cover a case such as this, where the goods are held to the order of the seller on terms on which he can get them back at once.

Accordingly, it becomes unnecessary, in my judgment, to deal with the second point raised by the justices, that at any rate the appellant company had possession when the inspector came to weigh the chickens. Mr. Dean, for whose argument the court is indebted, has taken other points of a minor character with which I can deal very briefly. He says, in the first place, that the information was bad in that the possession was laid as being at the branch depôt at East Street, Leicester, whereas, I suppose, he would say it ought to have been laid that possession was in the cold store of the cold storage company. In my judgment, there is nothing in that objection, and the matter is covered by section 100 of the Magistrates' Courts Act, 1952. He then says that the information was laid on the basis that they had these goods in their possession for the purpose of trade, whereas he says that if they did have them in their possession, they had them in their possession for the purposes of sale, and again he says that the charge was wrongly laid. For my part, I have found it a little difficult to see what is exactly meant by having goods in your possession for the purposes of trade as opposed to having them in your possession for the purposes of sale or of manufacture. It may be that it was designed to cover some such case as samples which, though not themselves for sale, would be used

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[16] [1944] 2 All E.R. 481, 482.

[17] [1916] 2 K.B. 753, 759.

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for the purposes of trade, but, in my judgment, the words "has "[goods] in his possession for, sale, or any purpose of trade" are not mutually exclusive, and I could not say that this charge was wrongly laid.

Finally, he maintains that the appellant company were entitled to a defence under the section, the particular defence being that "otherwise they had acted innocently." Those words have come before this court on many occasions. I find it unnecessary to go through the cases, of which the latest is *Slatcher* v. *George Mence Smith Ltd.*[18] It is sufficient, in my judgment, to say that I am satisfied that the appellant company could not avail themselves of that defence.

Lastly, I would like to say that I have every respect for the manner in which the justices dealt with this case. It was not an easy one to decide, in particular because it is not a case where any moral blame could conceivably be attached to the appellant company. We are not told what they were fined, but I hope it was very little. In my judgment this appeal should be dismissed.

WINN J. I agree.

WIDGERY J. I also agree.

Appeal dismissed with costs.
Certified that a point of law of general public importance involved.
Leave to appeal refused.

Solicitors: *Linklaters & Paines; Field, Roscoe & Co. for Town Clerk, Leicester.*

E. M. W.

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[18] [1951] 2 K.B. 631; [1951] 2 T.L.R. 272; [1951] 2 All E.R. 388, D.C.

C. A.

1961
June 21, 22, 23, 26.

Holroyd Pearce, Willmer and Pearson L.JJ.

MEEK *v.* FLEMING.

[1958 M. No. 2739.]

Evidence—Fresh evidence—Court of Appeal—Credit—Deception of court —Defendant senior police officer—Trial by jury—Defendant reduced in rank for misconduct before trial of action—Demotion concealed from judge, jury and plaintiff—Credit of parties material for determination of issue—Whether defendant entitled to retain judgment.

Barrister — Duty to court — Disclosure — Duty to court not to conceal matters to discredit of client relevant to issue for determination.

At the trial with a jury, in October, 1960, of an action brought in November, 1958, by a press photographer against "Chief Inspector "F." of the Metropolitan Police, claiming damages for alleged assault and wrongful imprisonment, the plaintiff's virtually unsupported evidence on the incident alleged to constitute the assault and on the other matters complained of was in direct conflict with that of the defendant, whose evidence as to the events before and after the alleged assault were supported by other police officers in uniform.

Between November, 1958, when the plaintiff issued his writ, and October, 1960, when the trial took place, the defendant had been reduced in rank by a disciplinary board to station sergeant for being party to an arrangement to practise a deception on a court of law in the course of his duty as a senior police officer. That was known to the defendant's legal advisers, but a decision, for which leading counsel for the defence assumed full responsibility, was taken not to make it known to the court, and deliberate steps to that end were taken in the conduct of the defence.

On the plaintiff's motion for leave to adduce the fresh evidence relating to the defendant's demotion, and his appeal asking for a new trial: —

Held, allowing the application and the appeal, that there must be a new trial, for to allow the defendant to retain the judgment thus unfairly obtained would be a miscarriage of justice.

Per curiam. The decision of leading counsel so to conceal the facts, albeit made after anxious consideration, was wrong; his duty to the court was unwarrantably subordinated to his duty to his client.

Dicta in *Hip Foong Hong* v. *H. Neotia & Co.* [1918] A.C. 888, 894, P.C.; *Mohahir Ali* v. *Ellmore* [1953] 1 W.L.R. 1300; [1953] 2 All E.R. 1044, 1046, C.A.; *Praed* v. *Graham* (1889) 24 Q.B.D. 53, 55, C.A. applied.

Tombling v. *Universal Bulb Co. Ltd.* [1951] 2 T.L.R. 289, C.A.; *Ladd* v. *Marshall* [1954] 1 W.L.R. 1489; [1954] 3 All E.R. 745, C.A.; *Braddock* v. *Tillotson's Newspapers Ltd.* [1950] 1 K.B. 47; 65 T.L.R. 553; [1949] 2 All E.R. 306, C.A. distinguished.

Judgment of Streatfeild J. set aside.

APPEAL from Streatfeild J. and a jury.

MOTION for leave to adduce fresh evidence.

Alan Sidney Charles Meek, a press photographer, the plaintiff in an action for damages for alleged assault and wrongful imprisonment against Richard Fleming as a chief inspector of the Metropolitan Police, appealed from a judgment entered for the defendant on the verdict of a jury and asked for a new trial on the grounds, inter alia, of misdirection by the judge and that the verdict was against the weight of the evidence. Paragraph (6) of his notice of appeal was as follows: "That at the trial the "rank and status of the defendant was by implication represented "to be that of a chief inspector when in fact between the date of "the matters complained of in the action and the date of the "trial he had been reduced to the rank of a station sergeant by "reason of misconduct and that the credit of the parties was a "crucial issue at the trial."

By a further notice of motion for leave to adduce fresh evidence it was alleged that on the question of credit the defendant deceived or misled the court, and thereby occasioned a miscarriage of justice.

The facts sufficiently appear from the judgment of Holroyd Pearce L.J.

Neville Faulks Q.C. and *Sebag Shaw* for the plaintiff. A new trial has never been granted on the basis of admitting fresh evidence as to credit, but it should be granted in this case where the crucial issue was as to which of the parties was to be believed and where the trial judge in his summing-up told the jury that the question for their decision was one of oath against oath. In *Hip Foong Hong* v. *H. Neotia & Co.*[1] Lord Buckmaster said that "in "all applications for a new trial the fundamental ground must be "that there has been a miscarriage of justice." That is the position here. *Tombling* v. *Universal Bulb Co. Ltd.*,[2] though readily distinguishable from the present case on its facts, is helpful because of the reasoning of the court and the observations of Denning L.J.[3] that if a favourable decision has been obtained by any improper conduct of the successful party the court will always be ready to grant a new trial. Singleton L.J.'s observations in *Mohahir Ali* v. *Ellmore*[4] that "if a witness who is also a defendant "is a superintendent of Leeds City Police Force, that shows he is "of good standing and . . . has the confidence of his superior "officers" support the submission that the defendant's apparent status of impeccable respectability in the present case was an important factor for consideration at the trial; and Lord Esher M.R. in *Praed* v. *Graham*[5] said that if a jury has been misled by, inter alia, the speeches of counsel, that is a ground for a new trial. If, therefore, the favourable result here was obtained by the misconduct of the parties or their legal advisers, however well intentioned, and if the jury were misled by the speeches of counsel, justice demands and our system of justice will insist that anyone who has obtained a result unfairly shall not be allowed to retain it.

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[1] [1918] A.C. 888, 894, P.C.

[2] [1951] 2 T.L.R. 289, C.A.

[3] Ibid. 298.

[4] [1953] 1 W.L.R. 1300, 1302, C.A.

[5] (1889) 24 Q.B.D. 53, 55.

On the narrower ground, the law on the subject of when the court will grant a new trial on the basis of admitting fresh evidence only as to the credit of a witness is summed up in *Ladd* v. *Marshall*[6] by Denning L.J. under three headings.

[Holroyd Pearce L.J. That is different from the present case. If one is trying to add evidence, the court will only add it if those three conditions are fulfilled; but if one is trying to subtract from the evidence, it is more difficult to see what effect the subtraction would have had.]

The proper approach is to consider what the effect would have been if counsel for the plaintiff in this case had learned the true facts during his cross-examination of the defendant and had put them to him. The effect would have been devastating. In *Braddock* v. *Tillotson's Newspapers Ltd.*[7] the court laid down very stringent tests, Tucker L.J.[8] saying that such a course would be justified only where the evidence was such that no reasonable jury could be expected to act on the evidence of the witness whose character has been called in question and that it would be wrong to admit fresh evidence directed solely to credit merely because there was a possibility, or a reasonable probability, that such evidence would result in a different verdict. Cohen L.J.[9] made the test even stronger, namely, that the additional evidence *must* have led to a different conclusion. It is submitted that this case satisfies even that stringent test.

[Pearson L.J. There are two considerations: (1) the effect of the fresh evidence on the original trial, and (2) its effect in any new trial.]

Yes, but if a verdict has been secured by improperly misleading a court, the court can set aside the verdict if it can be shown that the fresh evidence might reasonably have had an adverse effect on the original verdict. [*Brown* v. *Dean*[10] and *Rex* v. *Copestake, Ex parte Wilkinson, per* Hanworth M.R.,[11] were also referred to.] The proper time to consider the effect which this fresh evidence must have had is a moment as late in the trial as counsel for the plaintiff cross-examining the defendant could have introduced it. Its revelation at a late stage in this case *must* have turned the scale in the plaintiff's favour. [*In re*

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[6] [1954] 1 W.L.R. 1489, 1491; [1954] 3 All E.R. 745, C.A.

[7] [1950] 1 K.B. 47; 65 T.L.R. 553; [1949] 2 All E.R. 306, C.A.

[8] [1950] 1 K.B. 47, 53.

[9] Ibid. 56.

[10] [1910] A.C. 373, H.L.

[11] [1927] 1 K.B. 468, 474, C.A.

Herwin, Herwin v. *Herwin*[12]; *Corbett* v. *Corbett*[13]; and the notes to R.S.C., Ord. 58, r. 9 (2), Annual Practice, 1961, pp. 1675–1676, were also referred to.]

If a misconception of the duty owed by counsel to the court has led to conduct which could be described as "misconduct," although no evil was intended, the result should be the same, for the court has to look at the result vis-à-vis the parties.

Victor Durand Q.C. and *W. W. Stabb* for the defendant. The position of the defendant in relation to his demotion was carefully considered by leading counsel before the trial, with full knowledge of the facts. The considerations applied to the problem were: First, the facts relating to the cause of action could be prepared accurately in accordance with the proofs of the defendant and his witnesses, and they were so prepared. The emphasis on "facts" is important, for in the authorities relied on by the plaintiff a distinction was made between fresh evidence as to facts raising an issue in the case and evidence as to the credibility of a witness speaking to the primary facts. The evidence as to the night of November 5, 1958, was spoken to and tested throughout the trial, and there was a distinct variation on every aspect of that evidence between the case for the defendant and for the plaintiff.

Secondly, on the question of the character of the defendant the view was taken that a matter of discredit affecting the character of a party should not be disclosed to the court unless there were direct questions on it at the trial, in which case the defendant was instructed that he must answer frankly if he were asked about his present position.

Thirdly, the decision not to make known the present position of the defendant was not taken lightly, but was considered anxiously in the light of counsel's duty to the court, his client and his opponent; and the decision was taken in the light of the guidance given on the duties of counsel in Boulton's Conduct and Etiquette at the Bar (2nd ed., p. 67), that any deception of the court must be avoided but that counsel is under no duty to disclose facts known to him about his client's character or antecedent history, nor to correct information which may be given to the court by the prosecution if the correction would be detrimental to the client.

[PEARSON L.J. Is not that referring to criminal cases?]

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[12] [1953] Ch. 701; [1953] 3 W.L.R. 530; [1953] 2 All E.R. 782, C.A.

[13] [1953] P. 205; [1953] 2 W.L.R. 1124; [1953] 2 All E.R. 69.

It is reinforced by Denning L.J.'s observations in *Tombling's* case[14] on the duty of counsel. This defendant was only one of eight witnesses who gave evidence as to the whole of the events on November 5, 1958. The jury had the unsupported evidence of the plaintiff on one side as to most material events, and on the other the word in most cases of four witnesses on the middle period, the defendant alone for a second or two, and then four different witnesses speaking against the version pleaded and spoken to by the plaintiff. The question whether the impact of a revelation as to the defendant's previous disciplinary conviction would have been so devastating as is claimed on behalf of the plaintiff must thus be judged on an analysis of the evidence as a whole on which the jury returned their verdict.

[HOLROYD PEARCE L.J. The clearest evidence that it would have had an impact is the trouble that was taken to conceal it.]

There is no duty to disclose the defendant's character or rank and no rule concerning his dress in a civil court. There is a rule that in a criminal court a police officer must appear in uniform, but it is not always obeyed. In the civil court he is sued as a person and his rank and character are quite irrelevant. To address a police officer as "Mr." is common practice among advocates. Even if the court had assumed that the defendant was of the highest character and had acted on that assumption, it is not the duty of counsel to correct that assumption. The belief that he was a chief inspector was irrelevant at the trial, and at no stage was the evidence weighted in favour of the defendant's behaviour by reason of his accepted rank.

Further, the evidence sought to be admitted goes solely to credit. There is no application for the admission of new evidence relating to the facts in issue, though the present application is made under R.S.C., Ord. 58, r. 9, which refers to "facts." If questions as to facts in issue are held to include questions as to credit under rule 9, *Braddock's* case[15] must be distinguished before a new trial can be granted; for otherwise that decision binds the court on this application.

On the submission that the misleading of the court of trial resulted in a miscarriage of justice, it is well settled that in all applications for a new trial on that ground there must have been a miscarriage of justice touching on the facts in issue. The facts in issue here were the events of the night of November 5, 1958, and on those the court and the jury had the evidence of seven

[14] [1951] 2 T.L.R. 289, 297.

[15] [1950] 1 K.B. 47.

witnesses other than the defendant. There is no evidence that those witnesses were parties to the alleged misleading of the court, and if they had known, as they may have done, of the defendant's demotion, that could not affect the evidence they gave as to the night of November 5, when the defendant was still a chief inspector. His affirmative answer to the question in cross-examination whether he was a chief inspector and had been in the Force since 1938 has to be looked at in its context. It was a double question and related to the period up to November 5, 1958. Though in isolation the answer was evasive, its context was such as to nullify its effect.

[HOLROYD PEARCE L.J. He had a chance to tell the truth or to tell a lie and he told a lie.]

On the duty of the defendant's legal advisers, the court is asked to accept that there was no duty on the solicitors at all. They asked for guidance during the case, and the responsibility for taking the decision to conduct the case without revealing the defendant's demotion remains that of leading counsel alone. The opening and closing speeches of counsel as reported in "The "Times" newspaper were not directed to stressing the rank of the defendant but to pointing out to the jury that the witnesses for the defence were experienced officers who were unlikely to arrest anyone without good cause or to manhandle a citizen in a police station.

The court is asked to consider the following questions: First, is the fresh evidence directed to an issue on the pleadings? The answer is No. Then it must be directed to the credit of the defendant, one of eight important witnesses who contradicted the plaintiff. Secondly, was the court of trial misled by the defence as to the facts of the cause of action? The answer to that must be No. Thirdly, did the result obtained depend solely on the defendant's evidence? Again the answer is No. Fourthly, does the new evidence affect the position as it was at the trial or on November 5, 1958, of the other seven witnesses? Again the answer is No. Fifthly, can the court say, with the knowledge of the demotion and the reason for it before the court, that the jury "must" or "probably" or "possibly would" have found for the plaintiff? The answer to that is "possibly," and neither "must" nor "probably." Sixthly, did the defence allow the court to be misled as to the defendant's rank at the trial? The answer to that is Yes. Seventhly, was that "misleading" relevant to an issue of fact in the case? The answer is No.

Eighthly, was that "misleading" more than misleading as to the credit of the defendant? And the answer is No.

If silence is tolerable as to the past of a defendant in a civil action, there is no difference in principle, so long as the facts in issue are not tampered with. On the authorities on the admission of fresh evidence as to credit and the conditions in which a new trial will be ordered, if the suggested answers to the above questions are accepted by the court, there are here no grounds for admitting new evidence on credit alone, and there was no miscarriage of justice touching on the facts in issue in the case.

[WILLMER L.J. It appears that the jury took a long time. Does that affect the matter?]

It is submitted not, for experience shows that where one has the evidence of one man on one side and eight on the other, there is much to be canvassed.

[HOLROYD PEARCE L.J. I think it does make a difference. We all know juries who have taken a very long time on a simple case; but if they come back after five minutes it presents a different picture from that in which they come back after four hours. It is not conclusive, but it makes a difference. An advocate experienced in civil cases once said: "Every minute is the "plaintiff's minute."]

If one juror disagrees it may take a lot of time.

Faulks Q.C. in reply. In Boulton on Conduct and Etiquette at the Bar it is stated that any deception of the court must be avoided. "Misleading" and "deceiving" are synonymous in this context. When the defendant in this case agreed in cross-examination that he was a chief inspector it was the duty of leading counsel and his junior to retire from the case.

June 26. HOLROYD PEARCE L.J. The plaintiff appeals from the judgment of Streatfeild J. sitting with a jury given on October 21, 1960, after a trial lasting five days. The jury, after an absence of four hours, gave answers to certain questions on which the judge dismissed the action and entered judgment for the defendant. The plaintiff by his notice of appeal complains that the verdict was against the weight of evidence, and makes certain unsubstantial criticisms of the summing-up. These have not been stressed, and in my judgment no criticism can be made of the conduct of the judge or the verdict of the jury on the evidence before them. The real ground of this appeal is stated in the notice of appeal as follows: "(6) That at the trial the rank and "status of the defendant was by implication represented to be

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"that of a chief inspector when in fact between the date of the "matters complained of in the action and the date of the trial "he had been reduced to the rank of a station sergeant by reason "of misconduct and that the credit of the parties was a crucial "issue at the trial." A further notice of motion for leave to give fresh evidence alleges that on the question of credit the defendant deceived or misled the court, and thereby occasioned a miscarriage of justice.

The plaintiff was claiming damages for assault and wrongful imprisonment in respect of an incident that happened on Guy Fawkes night, November 5, 1958. There was a disorderly crowd in Trafalgar Square, and many police officers had been detailed to deal with it. They made a number of arrests that night, and removed the arrested persons in a police tender to Cannon Row police station where they charged them and then, as a rule, released them. The defendant was the chief inspector at Cannon Row police station, and was actively engaged in helping to control the disorder in Trafalgar Square. The plaintiff, a press photographer with a good record, was there with his camera for the purpose of taking photographs. At about 9.40 p.m. the defendant arrested him on a charge of obstructing the police, and took him in a tender to Cannon Row police station where he was kept in a cell until 1.30 a.m.

If the plaintiff's story was correct, the defendant arrested him without proper cause, used considerable violence to him which caused physical injury, and without justification locked him up for some hours instead of charging him straight away and releasing him. If the defendant's story was correct, he acted with propriety; he was justified in arresting the plaintiff, and the subsequent violence (which was far less than the plaintiff alleged) was wholly occasioned by the plaintiff's own violence and resistance.

On November 17, 1958, the plaintiff issued the writ in this action. On December 17 he appeared at the magistrates' court and was convicted of obstructing the police and fined £5. Another charge was dismissed.

On December 16, 1959, while this action was pending, certain events occurred which at the trial were unknown to the plaintiff's advisers, and which they had no reason to know or to suspect. These events were deliberately concealed at the trial by the defendant and his legal advisers. It is on this concealment that the plaintiff relies in this appeal. He asks for a new trial in order that these facts may be proved by fresh evidence.

The facts have been agreed between the parties for the purpose of this appeal in the following terms: "(1) At the date when the "defendant gave evidence at the trial of the action, his true rank "in the Metropolitan Police Force was station sergeant. (2) The "defendant was reduced from the rank of chief inspector to station "sergeant on December 16, 1959. (3) On December 16, 1959, the "defendant appeared before a disciplinary board on the following "charges: (i) Acting in a manner prejudicial to discipline by being "a party to an arrangement with" a police constable "whereby "that officer purported to have arrested a street bookmaker on "October 26, 1959, when in fact you were the officer who made "the arrest. (ii) Without good and sufficient cause did omit "promptly and diligently to attend to a matter which was your "duty as a constable, that is to say having arrested . . . for street "betting on October 26, 1959, you did not attend the hearing of "the case against him at Thames Metropolitan Magistrates' Court "on October 27, 1959.

"The defendant was reduced in rank to station sergeant on each "charge, but on appeal to the commissioner on December 30, the "punishment on the second charge was reduced to a reprimand, "but there was no variation in the first punishment."

It is conceded that those facts were known to the defendant's legal advisers and his counsel, and that as a matter of deliberate policy they were not put before the court. A letter written by the defendant's solicitor on November 21, 1960, pending the appeal, says: "The learned Queen's Counsel instructed by me was "throughout, as I believe you are aware, in full possession of all "the facts relating to my client's past and present status and the "reasons for his reduction in rank, and conducted the case in full "knowledge of these facts in the manner he felt was consistent "with his duty to his client and the court, and he is fully prepared "to defend and justify his handling of the case at the proper time "if called upon to do so."

It having been decided not to reveal these facts, the following things occurred at the trial. The defendant attended the trial not in uniform, but in plain clothes, whereas all the other police witnesses were in uniform. Thus there was no visible sign of the defendant's altered status. He was constantly addressed by his counsel as "Mr." and not by his rank of sergeant. Counsel tells us that he would so address a sergeant in the normal case. When the defendant entered the witness-box, he was not asked his name and rank in the usual manner. No suspicions were aroused since no one had any reason to suspect. The plaintiff's counsel, however, and the judge frequently addressed the defendant, or referred to him, as " inspector " or " chief inspector," and nothing was done to disabuse them.

The defendant started his evidence with a brief summary of his career up to the time when he was chief inspector at Cannon Row police station, but no reference was made to his reduction in rank. In cross-examination he was asked: " You are a chief inspector, " and you have been in the force, you told us, since 1938? (A) Yes, " that is true." That answer was a lie. Later: " (Q) You realise, " as chief inspector, the importance of the note being accurate? " (A) The importance of it conveying to me what I want to give in " evidence." He was asked further: " Let us understand this. " You are a chief inspector. How old are you? (A) I am forty-six " years of age." And again: " (Q) I am not asking you whether " you took part in the inquiries, but whether you as a responsible " and senior adult man—never mind about your being a chief " inspector—had no anxiety about this case, no concern or interest? " (A) No. I can only repeat I have nothing to fear."

The judge referred to the defendant as " inspector " or " chief " inspector Fleming " many times in his summing-up to the jury. It is clear that he reasonably considered that the defendant's rank and status were relevant on credibility in a case where there was oath against oath, and where there was a question of the defendant's conduct in the course of his duty. No doubt he felt what Singleton L.J. expressed in *Mohahir Ali* v. *Ellmore* [1] when, in dealing with a matter concerning evidence, he said: " It appears " to me that that evidence was irrelevant and unnecessary. The " fact that a witness who is also a defendant is a superintendent " of Leeds City Police shows that he is of good standing, and that " he has the confidence of his superior officers."

Nor was the defendant's counsel prepared to forgo the advantage to be derived from the status in the police force of his witnesses in general. The parties have, fortunately, in the interests of economy been able to use the reports of the case in " The Times " newspaper. These show that in his opening speech for the defence, counsel stated that the jury had not yet had an opportunity of listening to persons against whom it was at times fashionable to make wild hysterical allegations, but who could not have reached their positions unless they had shown to those who controlled the Metropolitan Police a substantial degree of responsibility. They were not concerned here with some newcomer to the force who had only just finished his course, and was out on the street full of enthusiasm to arrest the first person he could.

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[1] [1953] 1 W.L.R. 1300; [1953] 2 All E.R. 1044, 1046, C.A.

" The Times " report of the final speech of defendant's counsel shows that he said in reference to the allegations of the plaintiff: " That was un-English, and not what the jury would expect of " any police officer who had passed through the sieve, been " trained and risen to any rank in the Metropolitan Police." He then went on to contrast unfavourably the plaintiff's background in Fleet Street where " words come out in very large letters, and " the range of adjectives and description is so wide as to make " us callous." I accept from counsel that he was intending to refer to the generality of his seven or eight witnesses, all of whom had attained some rank above that of constable. Nevertheless, such references must inevitably have connoted in the minds of judge and jury a reference to the status of the defendant, who was the leading person in the case, and held (in their erroneous belief) the highest rank of all the witnesses.

The fact that the defendant's advisers were prepared to act as they did showed the great importance which they attached to the facts concealed. If one leaves aside for the moment any question of ethics, the hazards of such a course were extremely great. With so many police witnesses who might well know the truth (since the defendant's demotion was circulated in police orders) the chance of somebody in cross-examination referring to the defendant by his present rank of sergeant, or letting the truth out in some other way, was not negligible. Had that occurred, or had the plaintiff's counsel known the facts, and elicited them in cross-examination, it seems very unlikely that the jury would accept the defendant's case when they found how they had been deceived. Even without knowing the facts, the jury took four hours for their deliberations; and since the plaintiff's evidence was, broadly speaking, that of one against so many, one must, I think, conclude that he did well in the witness-box.

How then does the matter stand now that the truth has come out? This court is rightly loth to order a new trial on the ground of fresh evidence. Interest reipublicae ut sit finis litium. The cases show that this court has given great weight to that maxim. There would be a constant succession of retrials if judgments were to be set aside merely because something fresh that might have been material has come to light. In the case of fresh evidence relating to an issue in the case, the court will not order a new trial unless such evidence would probably have an important influence on the result of the case, though such evidence need not be decisive: *Rex* v. *Copestake, Ex parte Wilkinson*,[2] *per* Scrutton L.J., and *Ladd* v. *Marshall*.[3] Such evidence must also, of course, be apparently credible and such that it could not have been obtained with due diligence.[4] But in the present case the fresh evidence is agreed, and it could not have been found out with due diligence since there was no reason to suspect it. In the present case, therefore, these two latter considerations are not in issue.

Where, however, the fresh evidence does not relate directly to an issue, but is merely evidence as to the credibility of an important witness, this court applies a stricter test. It will only allow its admission (if ever) where "the evidence is of such a "nature and the circumstances of the case are such that no "reasonable jury could be expected to act upon the evidence of "the witness whose character had been called in question" (*per* Tucker L.J. in *Braddock* v. *Tillotson's Newspapers Ltd.*[5]), or "where the court is satisfied that the additional evidence *must* "have led a reasonable jury to a different conclusion from that "actually arrived at in the case": *per* Cohen L.J.[6] Mr. Neville Faulks claims that the fresh evidence in the present case satisfies even that strict test. But whether that be so, it is not necessary for us to decide.

Where the judge and jury have been misled, another principle makes itself felt. Lord Esher M.R. in *Praed* v. *Graham* [7] said: "If "the court can see that the jury in assessing damages have been "guilty of misconduct, or made some gross blunder, or have been "misled by the speeches of the counsel, those are undoubtedly "sufficient grounds for interfering with the verdict."

In *Tombling* v. *Universal Bulb Co. Ltd.*[8] it was sought to adduce fresh evidence on the ground that there had not been revealed to the judge the fact that a highly material witness was at the time of the trial serving a prison sentence for a motoring offence. Counsel had allowed him to give in evidence a residential address which was his normal home, and asked him questions which indicated that he had in the past held a responsible position. The appeal was dismissed; but Singleton L.J.[9] described the case as "near the line." Denning L.J. there said[10]: "This "raises an important question of professional duty. I do not "doubt that, if a favourable decision has been obtained by any "improper conduct of the successful party, this court will always "be ready to grant a new trial. The duty of counsel to his client "in a civil case—or in defending an accused person—is to make "every honest endeavour to succeed. He must not, of course, "knowingly mislead the court, either on the facts or on the law, "but, short of that, he may put such matters . . . as in his discretion he thinks will be most to the advantage of his client." I respectfully agree with those words. He then discussed the facts of that case, and came to the conclusion that there had been nothing improper in the conduct of the case for the plaintiffs. In that case the failure to reveal was not a premeditated line of conduct. Nor was conviction for a motoring offence so relevant on credibility as the demotion of a chief inspector (who is a party to the case) for an offence which consisted in deceiving a court of law as to the accurate facts relating to an arrest. There is no authority where the facts have been at all similar to those of the present case, but in my judgment the principles on which we should act are clear.

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[2] [1927] 1 K.B. 468, 477, C.A.

[3] [1954] 1 W.L.R. 1489; [1954] 3 All E.R. 745, C.A.

[4] [1954] 1 W.L.R. 1489, 1491.

[5] [1950] 1 K.B. 47, 53; 65 T.L.R. 553; [1949] 2 All E.R. 306, C.A.

[6] [1950] 1 K.B. 47, 56.

[7] (1889) 24 Q.B.D. 53, 55.

[8] [1951] W.N. 247; [1951] 2 T.L.R. 289, C.A.

Where a party deliberately misleads the court in a material matter, and that deception has probably tipped the scale in his favour (or even, as I think, where it may reasonably have done so), it would be wrong to allow him to retain the judgment thus unfairly procured. Finis litium is a desirable object, but it must not be sought by so great a sacrifice of justice which is and must remain the supreme object. Moreover, to allow the victor to keep the spoils so unworthily obtained would be an encouragement to such behaviour, and do even greater harm than the multiplication of trials.

In every case it must be a question of degree, weighing one principle against the other. In this case it is clear that the judge and jury were misled on an important matter. I appreciate that it is very hard at times for the advocate to see his path clearly between failure in his duty to the court, and failure in his duty to his client. I accept that in the present case the decision to conceal the facts was not made lightly, but after anxious consideration. But in my judgment the duty to the court was here unwarrantably subordinated to the duty to the client. It is no less surprising that this should be done when the defendant is a member of the

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[9] [1951] 2 T.L.R. 289.

[10] Ibid. 297.

Metropolitan Police Force on whose integrity the public are accustomed to rely.

It was argued that there were several other police witnesses against the plaintiff's story; that although part of the issue depended on the evidence of the parties alone, the greater part of the defence depended on other witnesses than the defendant, and that therefore the concealment did not have any substantial result. But since the defendant and his advisers thought fit to take so serious a step, they must, in the light of their own intimate knowledge of their case, have regarded the concealment as being of overwhelming importance to their success. Therefore I am not prepared to countenance their present argument that it may have made no difference to the result.

It was argued that the defendant was justified in that a party need not reveal something to his discredit; but that does not mean that he can by implication falsely pretend (where it is a material matter) to a rank and status that are not his, and, when he knows that the court is so deluded, foster and confirm that delusion by answers such as the defendant gave. Suggestio falsi went hand in hand with suppressio veri. It may well be that it was not so clear in prospect as it is in retrospect how wide the web of deceit would be woven before the verdict came to be given. But in the event it spread over all the evidence of the defendant. It affected the summing-up of the judge, and it must have affected the deliberations of the jury. The defendant and his legal advisers, and probably some at least of his witnesses, on the one hand, were aware of the facts, and intent not to reveal them, in order that on the other hand the plaintiff and his counsel and the jury and the judge might remain in ignorance, and that the defendant might be thereby enabled to masquerade as a chief inspector of unblemished reputation enjoying such advantage as that status and character would give him at the trial. It would be an intolerable infraction of the principles of justice to allow the defendant to retain a verdict thus obtained. I would, accordingly, allow the appeal with costs, and order a new trial.

Willmer L.J. I agree. In saying that, I wish to make it clear that not only do I concur in the result, but that I agree with and subscribe to the reasons which my Lord has so clearly stated.

The course which the defendant took resulted in the judge and the jury, as well as the plaintiff and his advisers, being deceived into thinking that the defendant was, and remained, a high-ranking officer of unblemished reputation. In view of the nature of the charges brought against him the character of the defendant was, in my judgment, a matter of vital importance for the proper determination of the case. We now know not only that the defendant has been reduced in rank to station sergeant, but that this was done in consequence of a disciplinary offence which involved the deception of a court of law. This is, therefore, the second occasion on which the defendant's conduct has had the result of deceiving the court. It is in these circumstances that the plaintiff now asks for an order for a new trial, basing himself on the submission that there has been a miscarriage of justice.

We are not dealing here with an ordinary case of an application to adduce fresh evidence. The plaintiff's contention involves something much more fundamental, and I regard this case as a wholly exceptional one, as was, I think, conceded in argument by Mr. Durand, counsel for the defendant. The rules which are ordinarily applied where an application is made to adduce further evidence on appeal are those set out by Denning L.J. in *Ladd* v. *Marshall.*[11] Where the fresh evidence sought to be adduced is directed solely to credit, the rules are even more stringent, as was pointed out by Tucker and Cohen L.JJ. in *Braddock* v. *Tillotson's Newspapers Ltd.*[12] in the passages to which my Lord has already referred. These rules are based upon the maxim that it is in the public interest that there should be an end to litigation. But in my judgment the application of this maxim cannot be pressed to the extent of allowing a miscarriage of justice to go uncorrected. The rules relating to the admission of fresh evidence do not apply, for instance, in a case where fraud or surprise is alleged; see *per* Lord Buckmaster in delivering the judgment of the Privy Council in *Hip Foong Hong* v. *H. Neotia & Co.*[13] He there said: "In all applications for a new trial the fundamental ground must "be that there has been a miscarriage of justice. If no charge "of fraud or surprise is brought forward, it is not sufficient to "show that there was further evidence that could have been "adduced to support the claim of the losing parties; the applicant "must go further and show that the evidence was of such a "character that it would, so far as can be foreseen, have formed "a determining factor in the result. Such considerations do not "apply to questions of surprise, and still less to questions of "fraud. A judgment that is tainted and affected by fraudulent "conduct is tainted throughout, and the whole must fail." In my judgment this is an analogous case and much the same considerations must apply.

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[11] [1954] 1 W.L.R. 1489, 1491.

[12] [1950] 1 K.B. 47, 53, 56.

[13] [1918] A.C. 888, 894, P.C.

I think that the exceptional nature of the present case becomes clear when regard is had to the features which distinguish it from *Tombling* v. *Universal Bulb Co. Ltd.*[14] There the application was to adduce further evidence by way of cross-examination of a witness for the plaintiff in respect of matters going to his credit. True, he was an important witness, but failure to disclose his record was only of incidental significance. But here we are concerned with evidence relating to the character of one of the parties to the suit, and it is a case in which the character of the parties was of peculiarly vital significance, so that failure to disclose the defendant's record amounted in effect to presenting the whole case on a false basis.

Next, the matter sought to be proved against the witness in *Tombling's* case[14] was his conviction for a wholly irrelevant offence, that is to say, a motoring offence. Here the matter sought to be proved against the defendant was an offence involving not only the deception of a court of law, but also a question of police discipline, a matter which, I should have thought, was of crucial importance having regard to the issues to be determined.

Lastly, in *Tombling's* case[14] what was done was not done knowingly to deceive the court; see *per* Denning L.J.[15] Had it been done knowingly, Denning L.J. would have regarded it as improper; and it is to be inferred that he would have concurred in the view of Singleton L.J.[16] that a new trial should have been directed.

In the present case there is no doubt that the course taken, which had the effect of deceiving the court, was taken deliberately. Counsel for the defendant has so informed us with complete candour. I accept his assurance that the decision was not taken lightly, but after careful consideration, and in the belief that the course taken was proper in all the circumstances. But for my part I am in no doubt that it was a wrong decision. I would venture to follow the example of Singleton L.J. in *Tombling's* case[17] in quoting from Lord Macmillan on "The Ethics of "Advocacy." This is what Lord Macmillan said: "In the discharge of his office the advocate has a duty to his client, a duty "to his opponent, a duty to the court, a duty to the State and a "duty to himself." It seems to me that the decision which was taken involved insufficient regard being paid to the duty owed to the court and to the plaintiff and his advisers.

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[14] [1951] 2 T.L.R. 289, C.A.

[15] Ibid. 298.

[16] Ibid.

[17] Ibid. 296.

The result of the decision that was taken was that the trial proceeded in a way that it should not have done. Where the court has been thus deceived in relation to what I conceive to be a matter of vital significance, I think it would be a miscarriage of justice to allow a verdict obtained in this way to stand. For these additional reasons, as well as for the reasons already stated by my Lord, I agree that this appeal must be allowed.

PEARSON L.J. I agree with the judgments which have been delivered. In the reported cases great emphasis has been laid on the need for finality in litigation, and the courts have been unwilling to order a new trial on the ground of fresh evidence having become available unless very stringent conditions were fulfilled; and there is no reported civil case in which a new trial has been ordered on account of fresh evidence not directly relating to an issue in the case, but merely affecting the credit of a witness: *Brown* v. *Dean*[18]; *Hip Foong Hong* v. *H. Neotia & Co.*[19]; *Rex* v. *Copestake, Ex parte Wilkinson*[20]; *Braddock* v. *Tillotson's Newspapers Ltd.*[21]; *Mohahir Ali* v. *Ellmore*[22]; *Ladd* v. *Marshall.*[23]

In the present case the fresh evidence only affects the credit of the defendant, and does not relate directly to any issue in the case. Accordingly it would not be right to order a new trial unless there is some feature of paramount importance outweighing the grave disadvantage of protracting the litigation.

In my opinion, however, there is such a feature in the present case.

It was decided, after very careful consideration, that the defendant's case should be conducted in such a way as not to reveal to the judge and jury the fact that the defendant had been demoted from the rank of chief inspector to the rank of station sergeant. Well-devised and effective steps were taken to carry out the decision, with the consequence that the defendant appeared to the judge and jury throughout the trial as a person still holding the rank of chief inspector, and therefore as a highly credit-worthy person, whereas in fact he had been demoted for an offence involving deception of a court. Whatever erroneous analogies may have prompted the decision, which was well

[18] [1910] A.C. 374, H.L.

[19] [1918] A.C. 888.

[20] [1927] 1 K.B. 468, C.A.

[21] [1950] 1 K.B. 47, 53, C.A.

[22] [1953] 2 All E.R. 1044, C.A.

[23] [1954] 1 W.L.R. 1489, C.A.

intentioned, it was, in my view, utterly wrong, and it had deplorable results. There was, in the result, at the trial of this action a deception of the court, and the defendant in cross-examination was giving uncandid (and at one point false) evidence in order to preserve the concealment of the truth.

The fresh evidence has materiality. The main issue at the trial was whether the evidence of the plaintiff or the evidence of the defendant should be believed as to what happened in the passage at the police station. If the purport of the fresh evidence had become known in the course of the trial, it would have shown both that the defendant had taken part in the deception of a court in the matter for which he was demoted, and also that he was at the trial of this action participating in another deception of a court.

Lord Buckmaster said in *Hip Foong Hong* v. *H. Neotia & Co.*[24]: " In all applications for a new trial the fundamental ground " must be that there has been a miscarriage of justice. If no " charge of fraud or surprise is brought forward, it is not sufficient " to show that there was further evidence that could have been " adduced to support the claim of the losing parties; the applicant " must go further and show that the evidence was of such a " character that it would, so far as can be foreseen, have formed " a determining factor in the result. Such considerations do not " apply to questions of surprise, and still less to questions of " fraud. A judgment that is tainted and affected by fraudulent " conduct is tainted throughout, and the whole must fail."

Having regard to the deception of the court and the materiality of the fresh evidence, I agree that the appeal should be allowed with costs, and that there should be an order for a new trial.

Durand Q.C. I indicated last week in the course of my argument before your Lordships that I took responsibility for the decision; I hope that the words I used then left the court under no misunderstanding as to my personal responsibility. It is right that I should say as emphatically and clearly as I can that the decision not to make disclosure of the defendant's change of status was mine, and mine alone. Having come to the conclusion that this course was justifiable, I determined and dictated the policy which was thereafter followed during the course of the trial. Neither my learned junior counsel, Mr. Stabb, nor my instructing solicitor was responsible for initiating or pursuing that policy, and indeed they expressed their disapproval of it. I thought it right, having regard to the observations made last week, to make that statement before your Lordships in open court, and I am very grateful to your Lordships for allowing me to make it.

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[24] [1918] A.C. 888, 894.

Motion allowed with costs.
Appeal allowed with costs and new trial ordered.
Judgment in court below set aside.
Plaintiff to have costs of first trial in any event, such costs to be taxed and paid forthwith.
Action to be set down for retrial within 28 *days from June* 26, 1961.
Although no specific order made, agreed that statement of facts used on appeal shall be admitted at retrial.

Solicitors: *Zeffertt, Heard & Morley Lawson; J. Stewart Williams, Solicitor, Metropolitan Police.*

M. M. H.

EAVES *v.* MORRIS MOTORS LTD.

[1959 E. No. 1112.]

C. A.
1961
June 19, 20, 21; *July* 5.

Holroyd Pearce, Willmer and Pearson L.JJ.

Factory—Dangerous machinery (fencing)—Dangerous combination of machinery and material — Bolts in block — Uncovenanted stroke by machine while bolts being removed—Workman injured by contact with bolt—Whether duty to fence against material in moving machine—Whether duty to fence against danger from unforeseeable movements of machine—Limitations of statutory protection—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 14 (1) (3).

A workman injured his finger on the rough burr of one of two bolts standing upright and secured by nuts in a block on a milling machine, when the block, operated by hydraulic power, which in its normal operation halted long enough to enable the operator to remove the milled bolts by hand, unexpectedly performed an uncovenanted stroke and moved towards the guarded cutters. The workman, in withdrawing his hand hastily, grazed his finger on the burred bolt; it became septic and had to be removed. He brought an action against his employers, alleging negligence at common law and breach of the duty to fence securely under section 14 of the Factories Act, 1937.[1] The trial judge awarded him damages on both heads of claim, holding, on the breach of statutory duty, that the block with the bolts standing in it constituted a dangerous part of machinery within section 14 (1) when it moved, because it carried the bolts with it. On appeal by the employers:—

Held, allowing the appeal, (1) that the wording of section 14 (1) and the authorities confined the duty under that section to such fencing as would protect the workman against dangers arising from direct contact with dangerous machinery, and, accordingly, in the absence of regulations made pursuant to subsection (3) with respect to the fencing of materials, the court was precluded from equating the bolts to the block and from holding that the bolt which caused the injury was part of the machine so as to call for fencing under section 14.

(2) That the duty imposed by section 14 was limited to fencing against reasonably foreseeable dangers, and did not require fencing against dangers arising from a machine going wrong in a way that could not reasonably be anticipated.

Per Holroyd Pearce L.J. (1) There is now no protection under the Act of 1937 against a class of obvious perils caused by dangerous machinery, arising from such machinery ejecting pieces of material or even pieces of the machine itself at the worker; and there is thereby left a gap in the statutory protection which neither logic nor common sense appears to justify.

(2) The authorities binding on this court do not prevent its holding that machinery operating normally on its usual material may be dangerous by reason of juxtaposition or conjunction of machinery and material, but there is an unfortunate divergence of judicial opinion on this point.

Close v. *Steel Company of Wales Ltd.* [1961] 3 W.L.R. 319; [1961] 2 All E.R. 953, H.L.; *Nicholls* v. *Austin* (*Leyton*) *Ltd.* [1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92, H.L.; *Bullock* v. *G. John Power* (*Agencies*) *Ltd.* [1956] 1 W.L.R. 171; [1956] 1 All E.R. 498, C.A.; and *Carroll* v. *Andrew Barclay & Sons Ltd.* [1948] A.C. 477; 64 T.L.R. 384; [1948] 2 All E.R. 386, H.L. applied.

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[1] Factories Act, 1937, s. 14: "(1) Every dangerous part of any "machinery, other than prime "movers and transmission machinery, "shall be securely fenced unless it is "in such a position or of such con"struction as to be as safe to every "person employed or working on the "premises as it would be if securely "fenced. . . . (3) Any part of a "stock-bar which projects beyond the "head-stock of a lathe shall be "securely fenced unless it is in such "a position as to be as safe to every "person employed or working on the "premises as it would be if securely "fenced. The Secretary of State "may, as respects any machine or "any process in which a machine is "used, make regulations requiring "the fencing of materials or articles "which are dangerous while in "motion in the machine."

Hindle v. *Birtwhistle* [1897] 1 Q.B. 192; 13 T.L.R. 129, D.C. distinguished.

Decision of Winn J. [1961] 1 W.L.R. 511; [1960] 3 All E.R. 656 reversed.

APPEAL from Winn J.

The plaintiff, John William Eaves, then an infant but now of full age, was engaged on piece-work in the task of putting bolts, two at a time, through a milling machine driven by hydraulic power. The speed of the operation was shown by the fact that he could normally hope to deal with 3,000 bolts during the night shift. He stood at a metal table on which was a vice or block into which he inserted two bolts standing upright. He made them secure by tightening a nut. He then pulled the starting handle, whereupon the metal table together with the block traversed a few inches towards the cutting knives of the machine, moving fairly fast. The knives had a guard of vertical bars which allowed the block to pass underneath them and the projecting bolts to pass between them. Thus there was no danger of his hand coming into contact with the knives. While the bolts were being milled by the knives the block momentarily halted. The block (and table) then reversed, the block still holding the bolts emerged once more from within the guard and returned to the position whence it started. The metal table and block would then halt. The plaintiff would then loosen the nut and remove the bolts. He would insert two fresh bolts, pull the starting handle again, and the whole operation would be repeated.

On the occasion of the accident the machine "repeated" or "performed an uncovenanted stroke." Instead of remaining stationary on the completion of its task, it suddenly for no apparent reason started off on its journey again without the plaintiff pulling the starting handle. He was just in the act of removing the finished bolts when this happened. He hastily withdrew his hand to avoid its being drawn towards and against the guard and in so doing cut his hand on a tiny burr or irregularity on the bolt head. The trivial cut became septic and he lost his finger.

He brought an action against his employers, claiming damages, first, for breach of the statutory duty to fence securely under section 14 of the Factories Act, 1937, and secondly, for alleged negligence in failing to use reasonable care to see that the machine was properly maintained, in consequence of which failure the machine "repeated."

It was conceded that the block without the bolts in it was not a dangerous part of the machinery. On the claim based on breach of statutory duty Winn J. in his judgment on October 11, 1960,[2] said: "There can be no doubt, in my judgment, that the block "is part of the machinery, and at the material moment a moving "part of the machinery. I cannot believe that it is right to take "the view, and I refuse to take it, that the bolts standing in that "block were not themselves part of the block. If the block itself "had had a sharp edge and by moving forward had cut the plaintiff's finger, then it would have been a moving part of the "machinery which was dangerous, moving as it was and giving "motion to the bolts which were then physically in it. I think "that the block comprised the bolts and the bolts in the block "were part of the machinery. I think it may be only playing "with words, but I put my thoughts a little differently when I "say that the block itself was a dangerous part of the machinery "when it moved, because it carried with it those bolts." The trial judge awarded damages to the plaintiff on both heads of claim and the employers appealed.

This report is concerned solely with the appeal on the question of breach of statutory duty

John Thompson Q.C. and *Richard Tucker* for the defendants. The question is whether these bolts when in the block on the table are dangerous parts of the machinery of the factory so that sections 14 and 16 of the Act of 1937 apply to them. In considering whether a part is dangerous, what has to be looked at is what is reasonably to be anticipated as a danger in the ordinary working of the machine, and not a danger arising from the performance of an uncovenanted stroke or "repeating" unexpectedly, as was the case here. Further, not merely are the bolts not dangerous parts, but they are not even parts of the machinery. They are the workpieces or components on which the machine works. A clear distinction has been kept, both in section 14 and in the decisions on it, between the machine itself and the materials or work in the machine. Subsection (1) does not require protection against dangers from components put into the machine, but is limited to fencing "every dangerous part of "any machinery." That was the view taken by this court in allowing the appeal in *Bullock* v. *G. John Power* (*Agencies*) *Ltd.*,[3] which is relied on, and which binds this court. Though subsection (3) makes specific provision in regard to lathes and stockbars, and also gives power to make regulations (under section 60) if danger is created by material or articles in the machine in motion, no such regulations have yet been made. The Horizontal Milling Machines Regulations, 1928 and 1934 (S.R. & O. 1928, No. 548, and S.R. & O. 1934, No. 207), have been made and apply to the cutters of this machine. Though regulations do not exhaust the possibility of statutory responsibility, the tendency of the courts is to look first at the regulations and to say that if the occupier has complied with them he has performed his duty. If regulation 3 of the Regulations of 1928 and 1934 applies in this case, as the plaintiff has claimed, it has been complied with, for these cutters were fenced, and it was not the non-fencing of the cutters which caused this accident.

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[2] [1961] 1 W.L.R. 511, 514; [1960] 3 All E.R. 656.

[3] [1956] 1 W.L.R. 171; [1956] 1 All E.R. 498, C.A.

"Machinery" for the purpose of section 14 does not comprehend the product of the factory, even where that product is itself machinery (see *Parvin* v. *Morton Machine Co. Ltd.*[4]); and hitherto all attempts to get the product in motion in the machine covered by the statutory requirement have failed. Almost equally unsuccessful have been the attempts to get broken parts of the machine included in the statutory requirement, though in *Rutherford* v. *R. E. Glanville & Sons* (*Bovey Tracey*) *Ltd.*,[5] where it was conceded that the characteristic of the machine was to eject bits of itself, this court held that the guard must be sufficient to contain the forces of disintegration. That was the principle applied in *Hindle* v. *Birtwhistle*[6] to the flying spindle, but it was decided on a different statutory provision. [*Dickson* v. *Flack*[7] and *Kilgollan* v. *William Cooke & Co. Ltd.*[8] were also referred to.]

Winn J. said that the block and the bolts together are part of the machinery which is dangerous because in motion; but it has to be observed that the injury was caused not by motion but by the roughness of the thing to be gripped by the hand, a danger existing whether the block was stationary or in motion; and if there was a duty to fence, it is difficult to see how the bolts could be removed even when they are complete.

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[4] [1952] A.C. 515; [1952] 1 T.L.R. 682; [1952] 1 All E.R. 670.

[5] [1958] 1 W.L.R. 415; [1958] 1 All E.R. 532, C.A.

[6] [1897] 1 Q.B. 192; 13 T.L.R. 129, D.C.

[7] [1953] 2 Q.B. 464; [1953] 3 W.L.R. 571; [1953] 2 All E.R. 840, C.A.

[8] [1956] 1 W.L.R. 527; [1956] 2 All E.R. 294, C.A.

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There has been a conflict of judicial opinion on the question whether when the combination of a piece of work in a machine and part of the machine itself produces a potential source of injury, such as a nip, the part of the machine with which the nip is formed can be designated as a "dangerous part" of the machinery: see *per* Lynskey J. in *Hoare* v. *M. & W. Grazebrook Ltd.*,[9] Finnemore J. in *Lenthall* v. *Gimson* (unreported) and Hinchcliffe J. in *Johnson* v. *J. Stone & Co. (Charlton) Ltd.*[10]; and, *per contra*, Ashworth J. in *Lewis* v. *High Duty Alloys Ltd.*[11] and Streatfeild J. in *Sparrow* v. *Fairey Aviation Ltd.*[12] But courts must construe the words of the Act and not the cases decided on the Act; and the Act by section 14 gives protection against danger from contact with parts of the machine and does not extend to the block with the bolts in the present case.

A. E. James Q.C. and *Irvon Sunderland* for the plaintiff. The principles to be applied in construing an Act designed to provide protection for the workman in a factory are those laid down by Wills J. in *Hindle* v. *Birtwhistle*,[13] although the statutory provision is now different. What has to be considered is the dangerous quality of machinery looked at as a whole, and not a piece of machinery as distinct from the product in it. In *Walker* v. *Bletchley Flettons Ltd.*[14] du Parcq L.J. said that a part of machinery is dangerous if it is a "possible cause" of injury to anyone acting in a way in which a human being may reasonably be expected to act. "Possible cause" was criticised in *John Summers & Sons Ltd.* v. *Frost*[15] by Lord Reid, who said that he preferred "reasonably foreseeable cause"; and that is the test now adopted. But until *Nicholls* v. *F. Austin (Leyton) Ltd.*[16] there was no suggestion of confining the statutory duty in modern industrial conditions to direct contact between a workman in a factory and part of the machinery, so as to exclude from the protection the escape of a dangerous part or portion of it and ejection of some other object which is being worked on or used in connection with the machine—as in the present case. [*Carroll* v. *Andrew Barclay & Sons Ltd.*[17] was also referred to.] In *Close*

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[9] [1957] 1 W.L.R. 638; [1957] 1 All E.R. 470.

[10] [1961] 1 W.L.R. 849; [1961] 1 All E.R. 867.

[11] [1957] 1 W.L.R. 632; [1957] 1 All E.R. 740.

[12] [1961] 1 W.L.R. 844; [1961] 1 All E.R. 216.

[13] [1897] 1 Q.B. 192.

[14] [1937] 1 All E.R. 170, 175.

[15] [1955] A.C. 740, 765-766; [1955] 2 W.L.R. 825; [1955] 1 All E.R. 870, H.L.

[16] [1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92, H.L.

[17] [1948] A.C. 477; 64 T.L.R. 384; [1948] 2 All E.R. 386, H.L.

v. *Steel Company of Wales Ltd.*[18] this court reviewed the position in relation to the principles enunciated in *Nicholls'* case[19] and invited the House of Lords to give some guidance. The decision of the House of Lords in *Close's* case[20] is to be delivered this week.

[HOLROYD PEARCE L.J. Then the court will adjourn the conclusion of this case until that decision is available.]

There is no warrant, after what this court said in *Close* v. *Steel Company of Wales Ltd.*,[21] for confining the obligation under section 14 to the method of incurring injury which was sought to be laid down in *Nicholls* v. *F. Austin (Leyton) Ltd.*,[22] or for excluding indirect danger where material is so fixed to the machinery as to be part of it. In *Bullock* v. *G. John Power (Agencies) Ltd.*[23] this court said that it was bound by *Nicholls'* case[24]; if *Bullock's* case were decided now it would be differently decided. In any event it is distinguishable from the present case on its facts, as is *Kilgollan* v. *William Cooke & Co. Ltd.*[25]

As to the power to make regulations under subsection (3) of section 14 in regard to articles or material dangerous while in motion in the machine, it is submitted, though without supporting authority, that that gives the Minister power to make regulations which will ameliorate the hardship on the occupier under subsection (1) by releasing him from compliance with subsection (1) where it is convenient and necessary. If the court construes subsection (3) to exclude the duty to protect against danger arising from contact with materials or articles in the machine or flying out of it, a large part of the protection which it is the object of the Act to provide is taken away. The reason why no regulations have been made yet may lie in the decisions of the court since *Carroll* v. *Andrew Barclay & Sons Ltd.*,[26] which the Minister may regard as having made regulations unnecessary.

Subject to what the House of Lords may say in *Close's* case, the duty to fence is now not to be limited as it was in *Nicholls'* case[27]; and where there is danger arising from material activated by part of the machine, or from the combination or juxtaposition of material and machine, the correct test is that applied by

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[18] [1960] 2 Q.B. 299; [1960] 3 W.L.R. 401; [1960] 2 All E.R. 657, C.A.
[19] [1946] A.C. 493.
[20] [1961] 3 W.L.R. 319; [1961] 2 All E.R. 963, H.L.
[21] [1960] 2 Q.B. 299.
[22] [1946] A.C. 493.
[23] [1956] 1 W.L.R. 171.
[24] [1946] A.C. 493.
[25] [1956] 1 W.L.R. 527.
[26] [1948] A.C. 477.
[27] [1946] A.C. 493.

Winn J. in the present case,[28] by looking at the whole picture of the operation of this machine producing bolts, which moved only because the block moved. That block being part of the machinery and foreseeably dangerous is, if it causes injury by the bolt, just as much the subject of the statutory duty as if the block itself had a razor edge. There was ample evidence in this case about this particular machine to lead a reasonable employer to conclude that this horizontal milling machine with its history of "repeating" should have been guarded against a reasonably foreseeable danger.

Thompson Q.C. replied.

July 5. Holroyd Pearce L.J. stated the facts set out above, read section 14 (1) and (3) of the Act of 1937, and continued: Regulations have been made under that section and section 60 with regard to fencing particular classes of machinery and when so made they take the place of and to that extent modify the absolute duty to fence under section 14 so far as concerns those particular classes of machinery. No regulations, however, have been made with regard to fencing the material used in machinery.

I feel sympathy with the judge's view of the matter and I would gladly accept it, were it not for subsection (3) of section 14 and authorities which are in my judgment inconsistent with that view.

Subsection (3) of section 14 would be completely pointless if the true meaning of section 14 (1) was that materials or articles which are dangerous while in motion in the machine can be regarded as part of the machinery and therefore have to be fenced under that section. For subsection (3) expressly gives the Secretary of State power to make regulations requiring them to be fenced. Moreover, it expressly provides for the fencing of a stock-bar which projects beyond the head-stock of a lathe—a typical example of material which is dangerous while in motion in the machine. It is therefore difficult to construe "machinery" in section 14 (1) as including the "materials or articles" which are "in motion in the machine."

I cannot accept Mr. James' ingenious suggestion that the words of subsection (3) are intended to give the Secretary of State power to modify the rigid requirements of subsection (1) by making regulations which will supersede them, and which by being in some respects less strict (as, for instance, the Horizontal Milling Machines Regulations, 1928 [S.R. & O. 1928, No. 548]), will give practical help on problems caused by the rigidity of fencing requirements. The words of subsection (3) do not tolerate such an argument. They are plainly directed to the making of regulations requiring the fencing of materials or articles and not to regulations modifying the fencing requirements of section 14 (1).

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[28] [1961] 1 W.L.R. 511; [1960] 3 All E.R. 656.

In *Hindle* v. *Birtwhistle* [1] it was decided that there had been a failure to fence a dangerous part of machinery when the shuttle flew off a weaving machine and injured the plaintiff. Wills J. said [2]: "Machinery or parts of machinery is and are dangerous if "in the ordinary course of human affairs danger may be reason- "ably anticipated from the use of them without protection."

It is urged by Mr. James that the judges were there considering danger as it should be considered, namely, as danger to the workman for whose protection the Act was passed, without restriction on how the danger is caused, provided that the danger emanates from the machinery and can reasonably be anticipated. That is an attractive and sensible approach if the wording of the Act of 1937 and the authorities allow it. But in *Nicholls* v. *Austin* (*Leyton*) *Ltd.*[3] the House of Lords on a consideration of the wording of section 14 concluded that the obligation under it was an obligation to guard against contact with machinery and not to guard against dangerous materials ejected from it—an obligation to "fence out" and not an obligation to "fence in."

In *Carroll* v. *Andrew Barclay & Sons Ltd.*[4] the House of Lords held that there was no breach of section 14 where a broken belt (part of the transmission machinery) lashed out at the plaintiff and injured him. But doubts were expressed by some of the noble and learned Lords whether, in spite of what was said in *Nicholls'* case,[5] machines which were dangerous because they ejected loose parts of the machinery (as opposed to materials in it) might not require to be fenced.

In *Dickson* v. *Flack* [6] this court, having considered those dicta, held that there was a breach of section 14 when a cutter thrown off (as was not unusual) from a spindle in a woodworking machine injured the plaintiff. The same view was taken by this court in *Newnham* v. *Taggart Morgan & Coles* [7] and *Rutherford* v. *R. E. Glanville & Sons* (*Bovey Tracey*) *Ltd.*[8]

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[1] [1897] 1 Q.B. 192; 13 T.L.R. 129, D.C.

[2] [1897] 1 Q.B. 192, 195.

[3] [1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92, H.L.

[4] [1948] A.C. 477; 64 T.L.R. 384; [1948] 2 All E.R. 386, H.L.

[5] [1946] A.C. 493.

[6] [1953] 2 Q.B. 464; [1953] 3 W.L.R. 571; [1953] 2 All E.R. 840, C.A.

[7] Unreported, July 19, 1956.

[8] [1958] 1 W.L.R. 415; [1958] 1 All E.R. 532, C.A.

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In *Bullock* v. *G. John Power* (*Agencies*) *Ltd.*[9] this court decided that a plaintiff could *not* recover in respect of injury caused by a loose end of wire which was being wound on an electric drum. The ratio of the case is in certain respects conclusive of the present case. The court founded itself on *Nicholls'* case [10] and on the distinction there drawn between the machinery and the materials in it.

Mr. James argued that that case would not now be so decided since this court was then largely relying on the view in *Nicholls'* case [10] that the purpose of fencing under section 14 was to keep out the body of a workman and not to fence in flying objects, and that, since subsequent cases such as *Dickson* v. *Flack* [11] have held that this view did not apply in respect of flying pieces of machinery, the natural force of *Bullock* v. *G. John Power* (*Agencies*) *Ltd.*[12] is abated. Therefore he urged us to return to the broad, common-sense view expressed by Wills and Wright JJ. in *Hindle* v. *Birtwhistle.*[13] But *Nicholls'* case [14] decided that material is a separate thing from the machine which controls it and that the section does not require material to be fenced. It was on that aspect of *Nicholls'* case [14] that this court decided *Bullock* v. *Power's* case.[15] Judicial opinion on that matter has never changed and in view of the wording of section 14 (3) it is difficult to see how it could do so.

Moreover, since Mr. James' argument was put before us, the case of *Close* v. *Steel Company of Wales Ltd.*[16] decided last week in the House of Lords by a majority that fencing is not required even against flying pieces of machinery and that, therefore, the three Court of Appeal decisions (supra) which decided otherwise were wrong. In that case Lord Evershed M.R.,[17] giving the judgment of the court, had pointed out the lack of logic or common sense in the distinction between danger from flying pieces of material and danger from flying pieces of machinery.

Since that recent decision of the House of Lords has disapproved of the extension of the section by this court (in *Dickson* v. *Flack* [18] and the two other cases above cited) to cover flying pieces of dangerous machinery, the illogical distinction between flying pieces of machinery and flying pieces of material has disappeared. But the unprotected gap between the actual dangers of dangerous machinery and the dangers against which fencing is required is correspondingly increased.

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[9] [1956] 1 W.L.R. 171; [1956] 1 All E.R. 498, C.A.

[10] [1946] A.C. 493.

[11] [1953] 2 Q.B. 464.

[12] [1956] 1 W.L.R. 171.

[13] [1897] 1 Q.B. 192.

[14] [1946] A.C. 493.

[15] [1956] 1 W.L.R. 171.

[16] [1961] 3 W.L.R. 319; [1961] 2 All E.R. 953, H.L.

[17] [1960] 2 Q.B. 299, 317; [1960] 3 W.L.R. 401; [1960] 2 All E.R. 657, C.A.

[18] [1953] 2 Q.B. 464.

Bullock v. *G. John Power (Agencies) Ltd.*[19] forbids us to hold that the danger (if any) created by the sharpness of the bolts themselves with which this block is normally armed can constitute it dangerous machinery within section 14. The judge was therefore not entitled to equate the bolts to the block or to hold that the sharp burr on the bolt made the machinery dangerous in the present case.

Mr. James argues before us that although the above authorities have held that dangerous machinery need not be fenced if the dangers they create come from flying machinery or material, yet machinery that is dangerous by reason of some juxtaposition with its normal material (for instance, when it creates a nip between the machinery and the material) is required to be fenced under section 14, and that in this case such danger caused the accident.

On the question how far machinery may be said to be dangerous within section 14 through conjunction with or juxtaposition with the materials on which it was working, Ashworth J., in *Lewis* v. *High Duty Alloys Ltd.*[20] and Streatfeild J., in *Sparrow* v. *Fairey Aviation Ltd.*,[21] have favoured the view that the presence of the material is not relevant for the purpose of considering whether machinery is dangerous. On the other hand, a different view has been taken by Finnemore J. in *Lenthall* v. *Gimson* (unreported), Lynskey J. in *Hoare* v. *M. & W. Grazebrook Ltd.*[22] and Hinchcliffe J. in *Johnson* v. *J. Stone & Co. (Charlton) Ltd.*[23] Each case must of course depend on its facts and in industrial cases the facts vary greatly. But that variation does not conceal an unfortunate divergence of view.

Although *Bullock* v. *G. John Power (Agencies) Ltd.*[24] does not allow us to equate dangers from the nature of the material (namely, the sharp edge of the bolts) to dangers from the machinery, it does not compel us when deciding whether machinery is dangerous to disregard the nature of the machine when it is doing its normal appointed task, or from holding it to be dangerous if that task clearly involves danger from its juxtaposition with its normal materials. If a moving arm of the machine does not project and is therefore safe when the machine is empty, but projects dangerously when the machine is supplied with its proper material, it can obviously be labelled as dangerous machinery. And if it creates a dangerous nip when supplied with its normal material and when working normally (or in a foreseeable manner) I see no reason in principle why the court cannot consider the machinery dangerous, even if that nip is only created by the juxtaposition of material and machinery. For in that case it is not the nature of the material and it is not the material itself which causes the danger. The danger is caused by the design of the machine itself working normally with harmless material.

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[19] [1956] 1 W.L.R. 171.

[20] [1957] 1 W.L.R. 632; [1957] 1 All E.R. 740.

[21] [1961] 1 W.L.R. 844; [1961] 1 All E.R. 216.

[22] [1957] 1 W.L.R. 638; [1957] 1 All E.R. 470.

[23] [1961] 1 W.L.R. 849; [1961] 1 All E.R. 867.

[24] [1956] 1 W.L.R. 171.

Therefore, if the block in this case when armed with the bolts for which it was intended and when working normally (or in a foreseeable manner) created a nip between the bolts and the guard, which might take the operator unawares, we could, in my view, hold that this machine was dangerous. But it would only be dangerous if it were shown that the " repeating " was reasonably foreseeable. The evidence here does not establish that a repeat was foreseeable.

Mr. James' able argument by which he seeks to rely on the law as it was laid down in *Hindle* v. *Birtwhistle* [25] cannot prevail in the light of more recent authorities and of the wording of the Act of 1937. The argument has shown how technical and artificial the question of protection under section 14 has become, and how illusory in certain respects the words " Every dangerous part of " any machinery shall be securely fenced " have now become. One may venture perhaps to express regret that an important part of the protection accorded to the workman by the Factory and Workshops Acts of 1878 and 1891 has been destroyed by the wording of the Factories Act, 1937, and the authorities based on that wording. Under the former Act dangerous machinery had to be fenced if danger might reasonably be anticipated from it: *Hindle* v. *Birtwhistle*.[25] Now dangerous machinery is only required by section 14 to be fenced against danger of a particular and limited kind, namely, danger from workmen coming into contact with the machine. There is no protection under section 14 against a class of obvious perils caused by dangerous machinery, namely, perils which arise from a dangerous machine ejecting at the worker pieces of the material or even pieces of the machinery itself. Thus, there is now left a gap which neither logic nor common sense appears to justify. [His Lordship then considered the appeal against the judge's decision at common law, and concluded:] In my judgment the plaintiff has not established that the defendants have failed to use reasonable care, and loth as I am to differ from a judge of wisdom and experience I would regretfully allow the appeal.

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[25] [1897] 1 Q.B. 192.

WILLMER L.J. I have reached the same conclusion. In so far as the plaintiff's claim is based on breach of section 14 of the Factories Act, 1937, I have not felt much difficulty, and I do not think that the judge's decision on that part of the case can be supported. The alternative claim in negligence seems to me to present a more difficult problem, and I confess that my mind has wavered during the hearing of the appeal. In the end, however, I am not prepared to dissent from the view expressed by my Lord, and like him I have reached the conclusion that negligence has not been established.

I will deal first with the claim based on breach of section 14 of the Act. By their recent decision in *Close* v. *Steel Company of Wales Ltd.*,[26] the House of Lords has, by a majority, laid down once and for all that the duty of an employer under section 14 (1) of the Act is limited to such fencing as will prevent the workman coming into contact with moving parts of the machinery. Here, therefore, the plaintiff can succeed only if he shows that his injury was due to the defendants' failure so to fence the machine in question as to prevent him from coming into contact with its moving parts. He can only do this if he is right in his contention that, in the circumstances of this case, the bolts on which he caught his finger are properly to be regarded as parts of the machine. The judge thought that they were, and I need not take time by referring again to the relevant part of his judgment, which my Lord has already read.

With all respect to the view of the judge, I do not think that it is a view which is open to us. Section 14 (3) of the Act draws the clearest possible distinction between the machine and materials or articles which may be in motion in the machine. The subsection would be unnecessary and, indeed, nonsensical, if it were permissible to regard the latter as themselves forming part of the machine. Moreover, the view of the judge seems to

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[26] [1961] 3 W.L.R. 319.

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me to be in direct conflict with the decision of this court in *Bullock* v. *G. John Power (Agencies) Ltd.*,[27] the authority of which must, in my view, be regarded as reinforced, albeit indirectly, by the decision of the House of Lords in *Close* v. *Steel Company of Wales Ltd.*[28] Having regard to the guidance which we have now received from the House of Lords, I do not think it necessary to refer to the numerous authorities which were cited to us on this aspect of the case. I content myself with saying that, in my judgment, we are precluded by authority from holding that the bolts which caused the plaintiff's injury were part of the machine, so as to call for fencing to prevent injury from contact with them.

But there is, I think, another and broader ground for holding that there was no breach of the statute in the present case. The provisions relating to fencing of dangerous machinery in Part II of the Act are designed, as I see it, to prevent dangers arising in the course of the normal operation of the machinery. I do not think that dangers due to the machinery breaking down or behaving in some abnormal and unexpected way are within the purview of the Act. I think this is implicit in the provisions of the Act itself. Thus it seems to me that the "motion" referred to in section 15, and the "motion" and "use" referred to in section 16, must in their context refer to motion and use in the course of normal operation. It is not without significance that every single one of the numerous cases brought to our attention has been concerned with dangers arising from machinery in the course of its normal operation. Moreover, it is obvious from the dicta of the various judges who have dealt with these cases that they have regarded the provisions of the Act as applicable only to such dangers. Thus in *Hoare* v. *M. & W. Grazebrook Ltd.*[29] Lynskey J., though I do not agree with his decision, stated the question correctly in my view, when he said that it was "whether "a machine becomes dangerous in the operation it is intended to "perform." In *Carroll* v. *Andrew Barclay & Sons Ltd.*[30] Lord Porter said: "Even in the case of the flying spindle, it was not "a breaking of a part of the machine, but an accident which "might have been expected from its ordinary working which had "to be guarded against." In the same case Lord Normand was,[31] I think, contemplating the normal working of the machine when he referred to the possibility that detachable or broken parts might be thrown off in working. Lord Goddard C.J. in *Newnham* v. *Taggart Morgan & Coles Ltd.*[32] (an unreported case, but referred to in the report of *Close* v. *Steel Company of Wales Ltd.*[33] in the Court of Appeal), while holding, as it would now appear erroneously, that the law requires fencing of a machine which it is known may cause danger by reason of its breaking, went on to add: "If that breaking is a risk which is, as I would "put it, inherent or likely to occur in the working of the "machine."

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[27] [1956] 1 W.L.R. 171.

[28] [1961] 3 W.L.R. 319.

[29] [1957] 1 W.L.R. 638, 643.

[30] [1948] A.C. 477, 485.

[31] Ibid. 490.

This view of the scope of the Act certainly accords with common sense. An employer may reasonably be expected to foresee and guard against dangers likely to arise in the course of the normal operation of machinery. But no man could be expected to foresee and guard against the almost unlimited possibilities of danger that might arise from a machine going wrong or operating in a way that it was never designed to do. If an employer were required to provide fencing to guard against all such possibilities of danger, this would, as it seems to me, impose an intolerable burden, and one which I cannot think Parliament can have intended to impose in the absence of any clear provision to that effect. The fact of a machine going wrong in such a way as to cause injury to a workman may, of course, and commonly will, provide evidence of negligence against the employers. It is so alleged, for instance, in the present case. Here, on the findings of the judge, the machine certainly did go wrong; it did something which it was never designed to do—or, to use Mr. Thompson's picturesque phrase, it "performed an uncovenanted stroke." This may be a ground for imputing negligence to the defendants or their servants, but it does not, in my judgment, provide any ground for saying, ex post facto, that they were in breach of their duty under the Act in not foreseeing it and in not providing fencing to guard against the danger of injury resulting therefrom. On this ground also I am satisfied that no case of breach of statutory duty was made out against these defendants. [His Lordship then considered, and concurred in allowing, the employers' appeal on the alternative claim of negligence, and concluded:] Taking the evidence as a whole, I think it does sufficiently show that the defendants had not, prior to this accident, been lacking in reasonable care in and about the maintenance of this machine. On the whole, therefore, I come to the conclusion that the charge of negligence was not made out against them. Accordingly, I agree that this appeal should be allowed.

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[32] Unreported, Bar Library Transcripts, 1956, No. 220.

[33] [1960] 2 Q.B. 299, 315.

PEARSON L.J. The construction of section 14 of the Factories Act, 1937, has been considered in a number of cases, and three propositions, derived from the general subject-matter of the section and its detailed provisions, have been established, which are relevant for the present case.

(1) A distinction is drawn between dangerous parts of machinery and materials or articles which are dangerous in motion in the machine. The dangerous parts of machinery are dealt with by subsection (1) and are, subject to certain exemptions, required to be fenced. The dangerous materials or articles (which are sometimes, as in this case, conveniently referred to as "components" because they are destined to become components of other machines) are not required by the section itself to be fenced, but there is a power under the concluding words of the section to make regulations requiring them to be fenced. No relevant regulations have been made, and one can see the difficulty of drafting general provisions for the fencing of things so variable as components: *Nicholls* v. *F. Austin (Leyton) Ltd.*[34]; *Carroll* v. *Andrew Barclay & Sons Ltd.*[35]; *Bullock* v. *G. John Power (Agencies) Ltd.*[36]; *Kilgollan* v. *William Cooke & Co. Ltd.*[37]; *Close* v. *Steel Company of Wales Ltd.*[38]

(2) The nature of the danger envisaged by section 14 (1) is that a workman may suffer injury directly by coming into contact with a dangerous part of the machinery, and indirect causation is not envisaged: *Nicholls* v. *F. Austin (Leyton) Ltd.*[39]; *Carroll* v. *Andrew Barclay & Sons Ltd.*[40]; *Bullock* v. *G. John Power (Agencies) Ltd.*[41]; *Kilgollan* v. *William Cooke & Co. Ltd.*[42]; *Close* v. *Steel Company of Wales Ltd.*[43] Those cases were largely concerned with the meaning and effect of the words "securely fenced," but they also show the nature of the danger envisaged.

(3) As regards the degree of danger envisaged, a part of machinery is "dangerous" within the meaning of the section if

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[34] [1946] A.C. 493.
[35] [1948] A.C. 477.
[36] [1956] 1 W.L.R. 171.
[37] [1956] 1 W.L.R. 527; [1956] 2 All E.R. 294, C.A.
[38] [1961] 3 W.L.R. 319.
[39] [1946] A.C. 493.
[40] [1948] A.C. 477.
[41] [1956] 1 W.L.R. 171.
[42] [1956] 1 W.L.R. 527.
[43] [1961] 3 W.L.R. 319.

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it is a reasonably foreseeable cause of injury to anybody acting in a way in which a human being may be expected to act in circumstances which may reasonably be expected to occur: *Walker* v. *Bletchley Flettons Ltd.*[44] (*per* du Parcq L.J.); *John Summers & Sons Ltd.* v. *Frost*[45] (*per* Lord Reid). In *Carroll* v. *Andrew Barclay & Sons Ltd.*[46] Lord Porter, referring to previous cases, said: "In each case, however, it was injury, caused by the work-"ing of the machine and the danger which might reasonably be "contemplated from its working. Even in the case of the flying "spindle, it was not a breaking of a part of the machine, but an "accident which might have been expected from its ordinary "working which had to be guarded against. The machine was "found to be a dangerous one because of the liability of spindles "to fly out and it was that danger which was liable to occur in "the course of its ordinary working, not its abnormal action in "breaking, for which a fence had to be provided." In *Close* v. *Steel Company of Wales Ltd.*[47] Lord Evershed M.R. said "a "part of a machine should not be regarded as 'dangerous' within "the language of the section unless the risk of injury can be "fairly described as reasonably foreseeable in the ordinary "course." On the question of what is reasonably foreseeable, reference can be made to the speech of Lord Porter in a negligence case, *Bolton* v. *Stone*,[48] where he said "Nor is the remote "possibility of injury occurring enough; there must be sufficient "probability to lead a reasonable man to anticipate it. The "existence of some risk is an ordinary incident of life, even when "all due care has been, as it must be, taken."

In my opinion the plaintiff has failed to prove that any relevant part of the machine was "dangerous" within the meaning of section 14. The combination of the table, the block and the bolts or other components would not cause any injury so long as it was operating properly. If it made an unintended movement, such as has been referred to as a "repeat" or an "uncovenanted "stroke," the operator would be taken by surprise, and if he was handling the components his hand might be caught by the moving components and suffer some injury, although nothing more than a very slight injury would be likely to occur. Even if that

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[44] [1937] 1 All E.R. 170, 175.

[45] [1955] A.C. 740, 765–766; [1955] 2 W.L.R. 825; [1955] 1 All E.R. 870, H.L.

[46] [1948] A.C. 477, 485.

[47] [1960] 2 Q.B. 299, 317.

[48] [1951] A.C. 850, 858; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078, H.L.

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was likely to happen, it would not render any part of the machinery "dangerous" within the meaning of the section, because the contact causing the injury would not be with the machinery but with the components in motion in the machine. On the facts of this case the distinction seems technical and artificial, but it is clearly drawn by the section, and any theory of indirect causation, for example, that the traverse is a dangerous part when some fault in it causes ultimately the movement of the components, is untenable under the section. Secondly, although it was proved that there was a "repeat" on the night shift of March 31, 1958, and there were "uncovenanted strokes" on the following morning, there was no proof that any such thing had ever happened to this machine or similiar machines in this factory before or since, or that there was any liability or tendency or propensity for any such thing to happen. The foreman had heard of such machines repeating but had never seen it apart from this case, and Haddon, the expert fitter, had been able to make the machines repeat by alteration of the controls in the course of testing and adjustment, but otherwise had apparently no experience of it. The plaintiff said in cross-examination "I can get "you 12 chaps who it did it on," but he did not call any witness who had had that experience except Hall. Hall said he had the experience on April 1, 1958, and there are several passages in his evidence showing that that was the only occasion. In view of Hall's own evidence, the unexpected statement by Cole in re-examination, to the effect that Hall made a complaint of his machine "repeating" some time before this accident happened, must be regarded as not only hearsay but also inherently unreliable. The necessary proof that the machine had a propensity to repeat is lacking. [His Lordship then considered the position at common law and concluded:] In this troublesome case I have been reluctant to differ from the judge's decision in favour of the plaintiff, but feel impelled by the evidence to the conclusion that the plaintiff did not prove that his accident was caused by any breach of statutory duty or negligence on the part of the defendants. I agree that the appeal should be allowed.

Appeal allowed with costs.
Leave to appeal.

Solicitors: *Herbert & Gowers & Co.; A. D. Vandaam & Co. for Hewitt & Walters, Birmingham.*

M. M. H.

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[1959 P. No. 73.]

Holroyd Pearce, Willmer and Pearson L.JJ.

Practice—Jury, civil action—Submission of no case—Appeal—Submission at conclusion of plaintiff's evidence—Defendants not required to elect whether to call evidence or not—Judge's ruling against submission of no case—Defendants calling evidence—Verdict and judgment for plaintiff—Appeal against judge's ruling as erroneous in law—Whether appellate court should disregard defendants' evidence—Duty of appellate court in civil actions to have regard to realities of whole case.

At the trial before a High Court judge sitting with a jury of an action for damages for negligence brought by the widow of a man killed in a road collision between his vehicle and a lorry owned by the first defendant and driven by his servant, the second defendant, counsel for the latter submitted at the conclusion of the evidence for the plaintiff that there was no case to go to the jury, and asked the judge so to rule. The judge, without requiring counsel to elect at that stage whether or not he would call evidence, rejected the submission. The driver then gave evidence; and at the conclusion of the case the jury returned a verdict for the plaintiff for £2,500, and judgment was entered accordingly.

The second defendant appealed on the ground that the judge had erred in law in rejecting the submission at the end of the plaintiff's case that there was no case to go to the jury, and contended that in considering that question the Court of Appeal should consider the evidence only up to the point at which the judge made his ruling, and should disregard the evidence for the defendant. It was conceded that, on the whole of the evidence, the jury could properly have found that the defendant driver was negligent:—

Held, dismissing the appeal, (1) that the judge had not erred in law, for there was here just sufficient evidence at the end of the case for the plaintiff to justify his ruling.

(2) That as the defendant had of his own volition chosen to give evidence when he could have stood on his submission and then appealed against the judge's ruling, the duty of the appellate court, whether on appeal from a judge with a jury or a judge alone, was to assess the position realistically and to consider the whole of the evidence, including that of the defendant, for it would be a denial of justice to a plaintiff in a civil action if the court made its assessment artificially on part of the evidence as it stood at the conclusion of her case when the judge made his ruling.

Great Western Railway Co. v. *Rimell* (1856) 18 C.B. 575 distinguished.

Groves v. *Cheltenham and East Gloucestershire Building Society* [1913] 2 K.B. 100 approved.

Quaere, whether the judge in a jury action has a discretion to rule on the defendant's submission of no case to go to the jury without first requiring the defendant to elect whether or not he will call evidence.

Dicta in *Alexander* v. *Rayson* [1936] 1 K.B. 169, 178; 52 T.L.R. 131, C.A.; *Parry* v. *Aluminium Corporation Ltd.* [1940] W.N. 44, 46; 56 T.L.R. 318, C.A.; and *Marbé* v. *George Edwardes (Daly's Theatre) Ltd.* [1928] 1 K.B. 269; 43 T.L.R. 809, C.A.; and ruling in *Young* v. *Rank* [1950] 2 K.B. 510; 66 T.L.R. (Pt. 2) 231; [1950] 2 All E.R. 166 considered.

Per curiam. No assistance as to the practice in civil actions can be derived from the practice in criminal appeals where different considerations apply, involving not only the liberty of the subject but also the requirement in section 4 of the Criminal Appeal Act, 1907,[1] that the court "shall" (subject to the proviso) allow an appeal where there has been a "wrong decision of any question of "law."

Reg. v. *Abbott* [1955] 2 Q.B. 497; [1955] 3 W.L.R. 369; [1955] 2 All E.R. 899, C.C.A. distinguished.

APPEAL from Havers J. and a jury.

The plaintiff, Mrs. June Payne, brought an action under the Fatal Accidents and the Law Reform (Miscellaneous Provisions) Acts against William Geoffrey Harrison, the owner of a lorry driven by his servant, Alec Edden, the second defendant, claiming damages as widow for the death of her husband, who was killed while driving an articulated vehicle with a trailer which collided with the lorry. The defendants denied negligence. At the trial with a jury the evidence before the court at the conclusion of the plaintiff's case included an agreed plan, a number of agreed photographs, the evidence of a police officer as to the position of the vehicles and the measurements which he took shortly after the accident, the answers to certain interrogatories administered on behalf of the plaintiff, and the evidence of two witnesses who could only speak as to how the deceased had been driving his vehicle some time before the accident. It was also admitted for the defendant driver that, in the course of what could only have been seconds before the collision, he had been engaged in overtaking a cyclist at a point where there was a sufficient curve in the road to obscure the vision ahead, and in a place where the

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[1] Criminal Appeal Act, 1907, s. 4: "(1) The Court of Criminal Appeal "on any such appeal against conviction shall allow the appeal if they "think . . . that the judgment of the "court before whom the appellant "was convicted should be set aside "on the ground of a wrong decision "of any question of law. . . . Provided that the court may, notwithstanding that they are of opinion "that the point raised in the appeal "might be decided in favour of the "appellant, dismiss the appeal if they "consider that no substantial miscarriage of justice has actually "occurred."

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road narrowed appreciably after a stretch of dual carriageway. It was also admitted that the defendant driver never applied his brakes.

At the close of the plaintiff's case counsel for the defendants submitted that there was no evidence to go to the jury and asked the judge so to rule. The judge, without putting counsel to his election, rejected that submission. The defendants then gave evidence; and in the result the jury returned a verdict for the plaintiff for £2,500 and judgment was entered accordingly.

The defendants appealed on the ground that the trial judge had erred in law in that, at the end of the plaintiff's case, he ought to have held on defence counsel's submission that there was no evidence to go to the jury, and at the conclusion of the plaintiff's case there was no evidence that the defendants were liable. The appeal was argued on the basis that the existence of the first defendant, who was only vicariously liable, could be disregarded.

D. J. Brabin Q.C. and *Derek Hodgson Q.C.* for the defendant. The judge having ruled at the end of the plaintiff's case, without putting the defendant to his election whether or not to call evidence, the ruling is appealable on the case as it stood at that point and the court on appeal will not review the whole of the evidence. That is because in trials with judge and a jury, where matters of law are for the judge and matters of fact for the jury, the judge's ruling is a matter of law, a judgment capable of being appealed against. If that is not correct, the practice as to submission of no case and election becomes valueless, and the distinction in practice between trial with a judge alone, which is not challenged, and with judge and jury becomes valueless. It is conceded that in the present case the defendant is trying to escape liability on a technical point, that the jury were entitled on the whole of the evidence to find for the plaintiff, and that the court may view with distaste the submission that they should not look at all the evidence. But the practice on this matter has become confused; it is usually dealt with ad hoc in court, for there is no rule governing it in the Rules of the Supreme Court; and practitioners would welcome a general ruling on the subject.

The basic principle as to the duties of judge and jury was stated in *Metropolitan Railway Co.* v. *Jackson*, *per* Lord Blackburn,[2] who said that non-suiting was a question of law and appealable as such. There are now only two kinds of non-suit:

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[2] (1877) 3 App.Cas. 193, 207, H.L.

(1) under R.S.C., Ord. 26, r. 1, by discontinuance as of right; and (2) by the plaintiff submitting to judgment so that he may start again. The note in the Annual Practice, 1961, at pp. 2010–2011, stating that the term "non-suit" is used as meaning "judgment for the defendant" is not correct.

Great Western Railway Co. v. *Rimell*[3] is the earliest authority relied on. There Jervis C.J., where the trial judge had ruled that there was a case to go to the jury after a submission of no case and the defendant then called evidence, said that the judge had ruled erroneously and that he should have at once directed a non-suit. It is conceded that in *Groves* v. *Cheltenham and East Gloucestershire Building Society* Lush J.[4] said that if the headnote in *Rimell's* case[5] was correct the practice had since changed and the court looked at the whole of the evidence; but *Grove's* case[6] is distinguishable, as being an appeal from a judge alone; and in any event the practice has since 1945 changed again. [*Skeate* v. *Slaters Ltd.*[7] and *Peters* v. *Perry & Co.*[8] were also referred to.]

In *Marbé* v. *Geo. Edwardes* (*Daly's Theatre*) *Ltd.*[9] Bankes L.J. said that in trials with a jury the judge had a discretion when to rule and that the defendant had to take the risk of calling evidence.

[HOLROYD PEARCE L.J. That is an odd decision, for the defendant was not given the advantage to which he was technically entitled.]

It illustrates the practitioner's difficulty. In *Alexander* v. *Rayson*[10] Romer L.J., obiter, made the clear distinction between judge alone and judge with a jury and suggested that in actions of the former kind it was undesirable for a judge to be asked to rule no case at the end of the plaintiff's case.

[HOLROYD PEARCE L.J. That statement caused much inconvenience in practice when it was made, for judges after it felt they had to hear every case out even though they knew the answer to it long before the end.]

In *Parry* v. *Aluminium Corporation*[11] Goddard L.J. made observations obiter, based, not on any authority but on his own experience and recollection as to how one should conduct a case

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[3] (1856) 18 C.B. 575, 584.

[4] [1913] 2 K.B. 100, 101–102.

[5] 18 C.B. 575.

[6] [1913] 2 K.B. 100.

[7] [1914] 2 K.B. 429, 433; 30 T.L.R. 290, C.A.

[8] (1894) 10 T.L.R. 366.

[9] [1928] 1 K.B. 269, 277–278; 43 T.L.R. 809, C.A.

[10] [1936] 1 K.B. 169, 178; 52 T.L.R. 131, C.A.

[11] [1940] W.N. 44, 46; 56 T.L.R. 318, C.A.

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with a jury at this stage; and in *Laurie* v. *Raglan Building Co. Ltd.*[12] those observations were applied. But in *Young* v. *Rank*[13] Devlin J. said that as *Parry's* case[14] was an appeal from a judge alone, he was not bound by Goddard L.J.'s observations, and held that he was free, as he was sitting with a jury, to apply what Romer L.J. had said in *Alexander* v. *Rayson*[15] and to exercise a discretion to rule without making the defendant elect to call no evidence. That decision is relied on. [*Hummerstone* v. *Leary*[16] was also referred to.]

The practice in criminal appeals is relevant on the present point, for the same situation arises in civil and criminal cases where there is a submission of no case to answer, the only differences being on the burden of proof, the effect of the proviso to section 4 of the Criminal Appeal Act, 1907 (which gives the court power to take an over-all view of the evidence), and the fact that in a criminal matter the defence may demand a ruling, while in a civil case counsel may ask for a ruling and the judge has a discretion whether to rule or not. In criminal appeals the practice has taken odd turns. In *Rex* v. *Pearson (No. 1)*,[17] *Rex* v. *George*,[18] *Rex* v. *Jackson*,[19] *Rex* v. *Fraser*[20] and *Rex* v. *Power*[21] the Court of Criminal Appeal said that it could look at all the evidence. In *Rex* v. *Joiner*[22] the contrary view, which it is submitted is now the correct practice, was taken, namely, that if there is at the end of the prosecution evidence no case to go to the jury, the judge should withdraw it from the jury. The most recent authority, *Reg.* v. *Abbott*,[23] shows the correct modern practice, for there the court looked at only part of the evidence and decided that the judge's incorrect ruling was an error of law. [*Rex* v. *Cohen and Bateman*[24] was also referred to.]

The authorities cited show that the practice has changed from time to time, and the important question is: What is the modern practice which everyone should follow?

N. R. Fox-Andrews Q.C. and *Paul Chadd* for the plaintiff.

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[12] [1942] 1 K.B. 152, 155; [1941] 3 All E.R. 332, C.A.

[13] [1950] 2 K.B. 510, 513; 66 T.L.R. (Pt. 2) 231; [1950] 2 All E.R. 166.

[14] [1940] W.N. 44, 46.

[15] [1936] 1 K.B. 169, 178.

[16] [1921] 2 K.B. 664; 37 T.L.R. 711, D.C.

[17] (1908) 1 Cr.App.R. 77, C.C.A.

[18] (1908) 1 Cr.App.R. 168; 25 T.L.R. 66, C.C.A.

[19] (1910) 5 Cr.App.R. 22, C.C.A.

[20] (1911) 7 Cr.App.R. 99, C.C.A.

[21] [1919] 1 K.B. 472; 35 T.L.R. 283, C.C.A.

[22] (1910) 4 Cr.App.R. 64; 26 T.L.R. 265, C.C.A.

[23] [1955] 2 Q.B. 497; [1955] 3 W.L.R. 369; [1955] 2 All E.R. 899, C.A.

[24] (1909) 2 Cr.App.R. 197.

Assuming that the judge was wrong in his ruling (which is not admitted), counsel for the defendant here had the choice of two courses: first, to accept the ruling, call no evidence, and appeal on the ground that there had been no case to go to the jury, and that the ruling was wrong in law; or, secondly, to take the course which he did, with its attendant risk, and accept the consequences. The short reply to his submissions, for which there is no support, even obiter, from any court of equal jurisdiction with this court, is that he cannot "have his cake and eat it." Even if the judge made a tactical error, it cannot be right, on the ordinary elementary principles applicable in civil cases, that the plaintiff should lose the benefit of a judgment rightly obtained on the whole of the evidence in this case, for the purpose of the courts of justice is to do justice. If the correct practice is that for which the defendant contends, injustice must follow. *Great Western Railway Co.* v. *Rimell*[25] does not support the defendant, for in that case none of the witnesses for the defendant gave any evidence which the jury could have regarded as establishing negligence. The other civil cases relied on are against the defendant. The observations of Goddard L.J. in *Parry* v. *Aluminium Corporation*[26] are relied on; a Lord Justice has the right to draw on his experience and recollection. The practice in criminal cases is distinct, because of the proviso to the Criminal Appeal Act, 1907.

Brabin replied.

HOLROYD PEARCE L.J. The defendants appeal from a judgment of Havers J., sitting with a jury, for £2,500 in favour of the plaintiff on a claim by her as widow under the Fatal Accidents and the Law Reform Acts. Her late husband was killed while driving an articulated vehicle which collided with a lorry, owned by the first defendant and driven by the second defendant, who was his servant. It is conceded that the jury could properly find negligence proved on the whole of the evidence, including that of the defendant driver. The case has been argued on the basis that the existence of the first defendant, who was merely vicariously liable, can be disregarded.

At the end of the plaintiff's case the defendant submitted that there was no evidence to go to the jury and asked the judge so to rule. The judge rejected that submission. The defendant then chose to give evidence, and in so doing provided evidence of negligence against himself. The jury returned a verdict for the plaintiff, and the judge entered judgment accordingly.

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[25] 18 C.B. 575, 584.

[26] [1940] W.N. 44, 46.

It is argued that at the close of the plaintiff's case the judge should have ruled that there was no case to go to the jury, and should have entered judgment for the defendant. In spite of the fact that after the judge's rejection of his submission the defendant chose to go into the witness-box, it is argued that this court should disregard his evidence, allow him to revert to the position before he gave evidence, and dismiss the plaintiff's case on the ground that it did not establish negligence against the defendant.

The argument is not, as Mr. Brabin frankly acknowledges, attractive, and even he cannot make it so. Such a situation as this only arises when a defendant is in truth liable but the paucity of the plaintiff's evidence makes the liability hard to prove. In such a case the defendant has the advantage that he can ask the judge to rule that there is no evidence to go to the jury and thus avoid the necessity of revealing by his own evidence that he is in truth liable. If the judge rules otherwise and the defendant considers that such ruling is wrong, he can always maintain his advantageous position by declining to give evidence. If the judge then wrongly gives judgment against him the defendant can come to this court. If, however, he deliberately abandons the advantage of not having to give evidence and seeks to make his escape from liability more certain by calling evidence, is it fair that he should be entitled to revert to the position which he voluntarily abandoned?

There is no authority which directly covers this case. In *Great Western Railway Co.* v. *Rimell* [1] the defendant at the end of the plaintiffs' case submitted that there was no evidence to go to the jury. The judge held that there was, and the defendant then called evidence. It was held that the defendant did not, by calling witnesses, preclude himself from appealing on the ground that the judge had ruled erroneously. Jervis C.J. said [2]: "I think "the judge was wrong in leaving the first question to the jury, "because there was in my opinion no evidence whatever for them "that any felony had been committed by any one of the company's "servants. In truth, unless the courts in cases of this sort take "upon themselves the duty of deciding, the statute which was "intended for the protection of the carrier, will become a dead "letter: for, juries always will find felony as against a company. "I think it is the duty of the presiding judge to withdraw the

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[1] (1856) 18 C.B. 575.

[2] Ibid. 585.

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" question altogether from the jury, and not to allow them an " opportunity of finding in favour of the plaintiff in defiance of " all evidence. I therefore think the judge of the county court in " this case was wrong in leaving it to the jury at all, and that " he ought at once to have directed a non-suit." But that case was different from the present in that at the end of all the evidence on both sides there was not a scintilla of evidence to go to the jury (*per* Cresswell J.[3]). The defendant's evidence left the situation unaltered and the judge was wrong when in his summing-up he told the jury that they could find in the plaintiffs' favour. The defendant's submission that there was no evidence to go to the jury was well founded not only when it was made but also when all the evidence had been called on both sides.

In *Groves* v. *Cheltenham and East Gloucestershire Building Society*[4] the defendants in a county court before a judge alone at the close of the plaintiff's case submitted that there was no case to answer. That submission was rejected and the defendants called evidence. The court said clearly that if on the whole of the evidence called the judge was entitled to find for the plaintiff, even if he was wrong in not non-suiting at the conclusion of the plaintiff's case, the court ought not to overrule his decision. It did, however, come to the conclusion that on the whole of the evidence the plaintiff could not succeed. Lush J. said[5]: " It is said that in " *Great Western Railway Co.* v. *Rimell*[6] it was held that, if on " an appeal from a county court it appeared that the county court " judge was wrong in not nonsuiting the plaintiff on an objection " taken at the close of his case that there was no evidence, the " court would allow the appeal although the defendant had called " witnesses whose evidence would justify his judgment. I do not " think that the court did so decide in that case although the " head-note seems to suggest it, but if that was the law a change " has come over the procedure, and in my judgment the law is " now different. The practice is now well recognised that if a " defendant, when the judge at the trial refuses to nonsuit, calls " evidence, the case is not then confined to the plaintiff's evidence " but also depends on that given by the defendant, and if on the " whole of the evidence the county court judge was justified in " coming to the conclusion he did, this court ought not to over- " rule him merely because it thinks he was wrong in not non- " suiting." Rowlatt J. concurred,[7] and the report adds that the court, on considering the whole of the evidence given in the county court, reversed the judgment of the county court judge on the ground that on all the evidence there was nothing to justify him in giving judgment for the plaintiff.

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[3] 18 C.B. 575, 586.
[4] [1913] 2 K.B. 100, D.C.
[5] Ibid. 101–102.
[6] 18 C.B. 575.
[7] [1913] 2 K.B. 100, 102.

Mr. Brabin submits that that case can be distinguished on the ground that it was an appeal from a judge alone. In my judgment, however, the principle which underlies the decision is equally applicable to a jury case and it is founded on justice and common sense. Certainly the judges in that case said nothing to suggest that there was any difference in principle between considerations in a jury case and those in a non-jury case.

Mr. Brabin, in a very fair and careful argument, has referred us to certain criminal cases. From 1908 onwards the Court of Criminal Appeal took the view that when the prosecution's evidence was insufficient but the defendant had given evidence, whether he had failed to make a submission that there was no case to answer or had made an unsuccessful submission to that effect, the court should or could look at the defendant's evidence as well as that of the prosecution: see *Rex* v. *George* [8]; *Rex* v. *Pearson (No. 1)* [9]; *Rex* v. *Jackson* [10]; *Rex* v. *Fraser* [11] but contra *Rex* v. *Joiner*.[12] In *Rex* v. *Power*,[13] where such a submission was rejected and a co-defendant thereafter was called for the defence and gave evidence which incriminated the appellant, it was held that the Court of Criminal Appeal was entitled to take into consideration that adverse evidence, following the majority of the earlier decisions in preference to *Rex* v. *Joiner*.[14]

In *Reg.* v. *Abbott*,[15] however, there was a somewhat different approach. and *Rex* v. *Power* [16] was explained. Mr. Brabin relies strongly on that case, but I do not find it helpful to the present problem. In that case the trial judge wrongly refused a submission made at the close of the prosecution's case that there was no evidence to go to the jury. Lord Goddard C.J.[17] emphasised the fact that the defendant did not supply any direct evidence against himself and that it was his co-defendant who supplied the damaging evidence. He considered that the appellant had an absolute right to have his appeal allowed, if there had been a

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[8] (1908) 1 Cr.App.R. 168; 25 T.L.R. 66, C.C.A.

[9] (1908) 1 Cr.App.R. 77, C.C.A.

[10] (1910) 5 Cr.App.R. 22, C.C.A.

[11] (1911) 7 Cr.App.R. 99.

[12] (1910) 4 Cr.App.R. 64; 26 T.L.R. 265, C.C.A.

[13] [1919] 1 K.B. 572; 35 T.L.R. 283, C.C.A.

[14] 4 Cr.App.R. 64.

[15] [1955] 2 Q.B. 497; [1955] 3 W.L.R. 369; [1955] 2 All E.R. 899, C.C.A.

[16] [1919] 1 K.B. 572.

[17] [1955] 2 Q.B. 497, 502–506.

" wrong decision of any question of law," unless it could be brought within the proviso [in section 4 of the Criminal Appeal Act, 1907] that the court considered that there had been no substantial miscarriage of justice. With regard to *Rex* v. *Power*,[18] he said [19]: " What was said was that, if the case did go to the jury, " the evidence given by the prisoners respectively was part of " the sum of the evidence in the case, and this court when asked to " quash a conviction might take the whole of the evidence into " account. They did not say that the court must do so, but " that the court might do so. They certainly did not say " that if there was no evidence given against one of two or more " prisoners the judge could simply leave the case to the jury to " see whether, when the case for the defence was opened, one or " other of the prisoners would support the case set up by the " prosecution."

In my view that case is different from the present case and is of no assistance, for the following reasons. It is clear that considerable weight was given to the fact that it was not the evidence given by or called by the defendant which provided the damaging evidence. The court there was considering that the prisoner had an absolute right (apart from the proviso) to have his appeal allowed if there was a " wrong decision of any question " of law," and was not applying the proviso, whereas in our case the question of applying justice as between the parties is always an essential part of the problem. Moreover, in certain respects the criminal courts may be prepared to extend to a defendant a latitude at the expense of the prosecution which the civil courts should not extend to a defendant at the expense of the plaintiff.

As to the exact rights of a defendant in a jury case in respect of submissions, there is some divergence of view which is irrelevant for the purposes of this case. In *Alexander* v. *Rayson* Romer L.J. said [20]: " Where an action is being heard by a jury " it is, of course, quite usual and often very convenient at the " end of the case of the plaintiff, or of the party having the onus " of proof, as the defendant had here, for the opposing party to " ask for the ruling of the judge whether there is any case to go " to the jury, who are the only judges of fact." That observation is obiter. He then goes on to say that such a procedure is highly inconvenient in actions tried by a judge alone, and that it is not right that he should be asked to express any opinion upon the

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[18] [1919] 1 K.B. 572.

[19] [1955] 2 Q.B. 497, 505–506.

[20] [1936] 1 K.B. 169, 178; 52 T.L.R. 131, C.A.

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evidence until the evidence is completed. The defendant in a non-jury case must therefore elect not to call evidence when he makes his submission that there is no case.

In *Parry* v. *Aluminium Corporation Ltd.*[21] Goddard L.J. made cogent obiter observations to the effect that the judge should not rule on submissions of no case in jury actions (except in certain classes of cases of which this is not one) unless the defendant elects to call no evidence. In *Young* v. *Rank*,[22] however, Devlin J. concluded that he had a discretion in a jury case to rule without making the defendant elect.

In *Marbé* v. *George Edwardes (Daly's Theatre) Ltd.*[23] Bankes L.J. said [24]: " Mr. Neilson for the defendants contended that . . . " it was for the judge to rule at that stage whether there was " evidence to go to the jury, and that if he had done that the " plaintiff must have failed. That argument has been addressed " to the court on several occasions and it has been held, and I " repeat now, that according to the present practice the judge has " a discretion whether he will rule on the matter at the close of " the plaintiff's case or whether he will defer ruling until the " whole of the evidence has been called. In the latter event " the defendant's counsel must then elect whether he will rely on " his objection that there is no evidence of malice, or call evidence " for the defendant at the risk of supplying evidence for the plaintiff " which the jury may accept as proving malice."

Thus there is authority for the view that the defendant has no right until all the evidence is concluded to have a ruling on a submission that there is no case to answer. Assuming, without deciding, that a judge in a jury case has a discretion to rule without putting the defendant to his election whether he will call evidence, the judge is certainly not bound to give a ruling until the evidence is concluded. When the evidence is concluded the defendant, of course, has a right to a ruling whether there is any evidence to go to the jury, and if there is no such evidence he has a right to judgment.

In this case, therefore, the judge certainly need not have ruled on the defendant's submission at that stage. He could have deferred his ruling and thereby made the defendant elect. Even assuming that the judge did rule incorrectly, the defendant was thereby left in the position in which at the least the judge had every right to place him, namely, he was compelled to elect. Either he could call no evidence and stand on his submission before the judge, and if necessary before this court, or he could call evidence. He took the latter course. He cannot now, when it has proved disadvantageous, revert to the former course. Events have moved on since he made his choice. Truth has superseded hypothesis. It has been shown by evidence that the defendant was negligent, and the process of the law has given the plaintiff a judgment to which she thus became entitled. There is nothing here which suffices to "lure it back to cancel half "a line." It would be a denial of justice now to deprive the plaintiff of that judgment by assessing the case artificially on a fragment of evidence when the whole has, by the defendant's choice, become available.

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[21] [1940] W.N. 44, 46; 56 T.L.R. 318, C.A.

[22] [1950] 2 K.B. 510; 66 T.L.R. (Pt. 2) 231; [1950] 2 All E.R. 166.

[23] [1928] 1 K.B. 269; 43 T.L.R. 809, C.A.

[24] [1928] 1 K.B. 269, 277–278.

The question whether the judge was right in his ruling does not, therefore, arise. Now that the defendant has himself provided evidence of his own negligence, an interlocutory assessment of the evidence as it stood at the time when the plaintiff closed her case has become academic and irrelevant. If it were relevant I would hold on the facts (which it is unnecessary to recapitulate) that there was just sufficient evidence on the plaintiff's case to justify the judge in leaving it to the jury. I would therefore dismiss the appeal.

WILLMER L.J. I have come to the same conclusion. In order to succeed on this appeal the defendants must show: first, that the judge was in error when he ruled at the conclusion of the plaintiff's case that there was evidence to go to the jury, and secondly, that on this assumption, they are entitled now to be put back in the same position as they would have been in had the judge ruled that there was no case to answer. In my judgment the defendants fail on both points.

As to the first point, the evidence before the court at the conclusion of the plaintiff's case included the agreed plan, a number of agreed photographs, the evidence of the police officer as to the positions of the vehicles and the measurements which he took shortly after the accident, and the answers to certain interrogatories administered on behalf of the plaintiff. I leave out of consideration the evidence of two witnesses called on behalf of the plaintiff, who could only speak as to how the deceased was driving his vehicle some time before the accident. But even without this I am satisfied that enough was proved on behalf of the plaintiff to call for an answer by the defendants. It was admitted that in the course of what can only have been seconds before the collision the defendant driver was engaged in overtaking a cyclist. This he did at a point where there was a sufficient curve in the road to obscure the vision ahead, and in a place where the road narrowed appreciably after a stretch of dual carriageway. The measurements given in evidence were such as to prompt a well-nigh inevitable inference that in the course of overtaking the cyclist the defendant driver must have pulled out so that part of his vehicle was materially beyond the centre of the road. The points of contact between the defendant's lorry and the trailer of the deceased's vehicle were such as to make it at least highly probable that at the moment of that contact the off side of the defendant's lorry was on its wrong side of the road. This must be taken in conjunction with the admission that the defendant driver never from first to last applied his brakes. It may be said that the material available did not make a particularly strong case, and that it was one that could readily be rebutted. But having regard to the admitted facts and the inferences that could properly be drawn therefrom, I find it impossible to say that the judge came to a wrong conclusion when he ruled that there was a case to answer.

That is sufficient to dispose of this appeal. But I am equally satisfied that, even if the judge's ruling were shown to be wrong, it would now be impossible for this court to put the parties back in the position they would have been in had the ruling been the other way. Evidence has now been given on behalf of the defendants, and the jury have found, on the whole of the evidence, that the collision was actually caused by the negligence of the defendant driver. Mr. Brabin has frankly admitted that he cannot properly attack this finding if the whole of the evidence is to be taken into consideration. His argument is nothing if not audacious. He concedes that on the facts as they are now known the defendant driver was to blame; yet he contends that, if he can show that the judge was wrong in ruling that there was a case to answer, the defendant is in law entitled to escape liability for the consequences of his negligence. Mr. Brabin frankly admitted that his argument would be the same even if the defendant, when giving his evidence, had admitted on oath in terms that he was entirely to blame for the collision.

I should be sorry indeed to think that the law could produce any such result as that. But in my judgment it does not.

The defendants in this case themselves invited the judge's ruling. He gave his ruling without putting Mr. Brabin to his election as to whether he would call evidence or not. In so doing he followed the course set by Devlin J. in *Young* v. *Rank*.[25] On receiving the judge's ruling the defendants were left perfectly free to call their evidence or not as they thought fit. They could, if they wished, have stood on their submission, and if judgment went against them they could appeal to this court against the judge's ruling. Or they could take the course they did take, call their evidence, and take the jury's verdict on the evidence as a whole. What they could not do was—to use Mr. Fox-Andrews' picturesque expression—"to have their cake and eat it." Though not put to his election before the judge ruled, counsel for the defendants was in the position, after the judge had ruled that there was a case to answer, in which he had to elect what course he would take. Having made his election he must, in my judgment, stand by it. He elected to call his evidence and take the verdict of the jury on the whole of the case. No doubt he hoped that the witnesses he called would make it clear that the defendant's lorry was in no way at fault. But having made his election he cannot, when the verdict goes against him, return to the position he was in before the evidence was called, and invite this court to shut its eyes to the effect of the evidence which he freely elected to adduce. It would, in my judgment, be contrary to all principle for this court so to ignore all the realities of the case and to pronounce judgment on a hypothetical basis, as if the defendants' evidence had never been given.

I have reached this conclusion on the basis of what I conceive to be the principle involved. There is a strange paucity of authority directly in point. But I am happy to find that my conclusion is substantially in accord with the decision of the Divisional Court in *Groves* v. *Cheltenham and East Gloucestershire Building Society*,[26] to which my Lord has already referred. That was, it is true, a county court case, in which the county court judge had refused to non-suit the plaintiff. But I do not think the principle can be any different where a judge of the High Court rules against a submission that there is no case to answer. My Lord has already read what was said by Lush J. in that case,[27] and I need not repeat it. In my judgment it was a correct statement of the principle involved, and mutatis mutandis covers the circumstances of this case.

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[25] [1950] 2 K.B. 510.

[26] [1913] 2 K.B. 100.

[27] Ibid. 101-102.

It only remains for me to add that for my part I do not think that any argument can properly be founded on the practice of the Court of Criminal Appeal in dealing with appeals in criminal matters. The fact that in such cases the liberty of the subject is at stake is enough, to my mind, to distinguish them from cases in which the question at issue is merely one of civil liability. Moreover, the conduct of criminal appeals is governed by the Criminal Appeal Act, 1907, section 4 of which specifically requires, subject to the proviso, that the court "*shall* allow the appeal if "they think . . . that the judgment of the court before whom the "appellant was convicted should be set aside on the ground of a "wrong decision of any question of law." In these circumstances, I for my part prefer to express no opinion on the question how far the decision in *Rex* v. *Power*[28] has been affected by the later decision in *Reg.* v. *Abbott.*[29]

For the reasons I have given, as well as those given by my Lord, with which I wholly agree, I have come to the conclusion that this appeal should be dismissed.

PEARSON L.J. I agree, and base my judgment on two grounds. First, at the end of the plaintiff's case the defendants' counsel submitted that there was no evidence to go to the jury. The judge did not require the defendants' counsel to elect at that stage whether or not he would call evidence but, after hearing argument, rejected the submission. The defendants then called evidence. Now, on appeal, the defendants' counsel contends that this court should disregard the evidence called by the defendants and decide whether or not the submission was well founded at the time when it was made. In my view, for the reasons which have been given by my Lords, the defendants, having elected, after the rejection of the submission, to call their own evidence, must take the consequences, whether favourable or unfavourable to their case. This court should decide on the whole of the evidence as it stands.

In view of doubts arising on the authorities as to the principles involved, I prefer to express no opinion on the questions: (a) whether it was right to give a ruling without first requiring the defendants to elect whether or not they would call evidence, and (b) whether, when the defendant's counsel makes a submission of this kind at the end of the plaintiff's case, the defendant is entitled to have a decision on his submission at that stage, or whether the court may defer its ruling until after all the evidence has been concluded.

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[28] [1919] 1 K.B. 572.

[29] [1955] 2 Q.B. 497.

Secondly, on the question of fact, I agree with the judge that at the conclusion of the plaintiff's case there was some evidence on which the jury could decide, if they thought fit, that there was negligence on the part of the defendants causing or contributing to the causation of the accident. I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Hewitt, Woollacott & Chown for Shaw, Smith & Co., Manchester; Pattinson & Brewer for Lawrence, Williams & Co., Bristol.*

M. M. H.

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